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JOURNAL *of the* STATE BAR ASSOCIATION

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TWENTY-THIRD ANNUAL MEETING

OF THE

MISSISSIPPI STATE BAR ASSOCIATION

HELD AT

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Editorial

There has been an urgent and well defined need for many years for a local publication in Mississippi devoted to the needs and interests of the lawyer, the bench, and the law student. Looking to this end there has been from time to time spasmodic and ineffectual efforts to bring into existence such a publication. The efforts have largely originated with the students of the School of Law, supplemented to a certain extent by a few sympathetic members of the bar. These efforts have all proven fruitless by reason of the want of active interest and co-operation on the part of the bar of the state, which resulted in a lack of funds with which to accomplish the purpose desired. It appears now for the first time, looking at the situation from a practical standpoint, that a legal publication to be published jointly by the bar and the law school is possible and entirely feasible.

I think it proper and just to here state that the successful outcome is largely due to the efforts of Honorable Louis M. Jiggitts, the capable and efficient secretary of the State Bar Association, who during the time he was a student in the University School of Law, and since, has worked unceasingly to see the Mississippi Law Journal an accomplished fact.

The possibility of a successful establishment of the Law Journal became a reality when the Bar Association at its meeting at the Markham Hotel in Gulfport, Mississippi, in May, 1928, unanimously consented to join with the faculty and students of the state law school in the publication of a law journal.

The fundamental purpose of the journal is to perform a distinct and valuable service, (a) to the bar of the state by creating a forum where interesting and vital legal questions of a helpful nature to the profession and the judiciary of the state may be discussed. A forum in which matters peculiarly of interest to the lawyers and law students may find expression. It is true the bar of the state and the law students have had the benefits of great law journals, such as the American Bar Journal and others of like nature, but these publications do not and can not take care of the local needs. One feature of the journal which should appeal to the bar will be the publication of the annotations of our decisions and statutes to the re-statement of the common law by the American Law Institute. A committee was appointed by the Bar Association at the Gulfport meeting charged with the duty of working out some plan whereby our decisions and statutes might be annotated to the

law as restated by the American Law Institute. The committee has been able to procure Chief Justice Sidney Smith and Honorable George Butler of the Jackson Bar, together with members of the law faculty, to annotate our decisions and statutes to the subjects of the law already restated and those subjects partially restated by the American Law Institute, namely, Conflict of Laws, Torts, Contracts, and Criminal Law. This feature of the journal alone should be of great value to the bar in Mississippi, especially, since the Mississippi Supreme Court will cite the re-statement of the law, (b) it will open a forum for the student of law who is not in the active practice, both in and out of the law school, for the discussion of timely and pertinent legal questions, together with comments on and criticisms of cases and questions of law passed upon by the Mississippi courts.

These thought provoking legal discussions will be helpful to every progressive member of the bar.

The editor-in-chief of the Journal most earnestly asks the sympathetic interest and help of every member of the bar in the state to the end that the Journal may become a permanently established periodical that will render through the years a most distinct and helpful service to the judiciary, the bar, and the law students of the state.

T. C. K.

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PROCEEDINGS

OF THE

Twenty-Third Annual Meeting

OF THE

Mississippi State Bar Association

HELD AT

GULFPORT, MISSISSIPPI

May 2nd and 3rd

1 9 2 8

PROCEEDINGS OF TWENTY-THIRD ANNUAL MEETING OF THE MISSISSIPPI STATE BAR ASSOCIATION

PRESIDENT WILBOURN: The Twenty-third Session of the Mississippi State Bar Association will now come to order. Please all of you rise, and we will be led in prayer by Reverend Mr. Clifford.

REVEREND VICTOR G. CLIFFORD: Almighty God, our heavenly Father, Thou art the creator of all things and the Father of all men, we bow before Thee this morning recognizing our dependence upon Thee. Thy goodness and mercy hath followed us all the days of our lives, and Thou hath been good to us. And this morning we give thanks unto Thee for all these blessings that have been ours. We thank Thee for our great country; for this great commonwealth of ours; for our homes, our friends, our loved ones; and we pray today, our Heavenly Father, that Thou wilt continue Thy blessings upon us; that Thou wilt bless us for the days that lie ahead of us. We pray that Thou wilt continue Thy blessings upon our country, upon our State, upon this fair Southland.

And we pray, our Father, that Thou wilt especially bless, in the very beginning, this Bar Association, in its deliberations, in the individual lives and experiences of each member of it; and we pray, our Father, that all of us in this great day of opportunity may rightfully fulfill the responsibilities that are ours, and take advantage of the opportunities that present themselves to us today.

Bless us all together now, and go with us through the coming days of life, we ask for Chirst's sake. Amen.

PRESIDENT WILBOURN: At this time, I desire to give opportunity to introduce any visiting attorneys from other bar associations, or from outside of the state, so that they may be recognized and have the privileges of the floor while our sessions are in progress. Is there anyone who will introduce a visiting member?

JUDGE C. C. MILLER: Mr. President, and Members of the Bar Association: It is with pleasure that I introduce Judge W. L. Martin, of Birmingham, Alabama, ex-Attorney General, former Circuit Judge, member of the Bar Association of Alabama, and member of the American Bar Association.

PRESIDENT WILBOURN: Are there any other visiting attorneys? We are indeed happy to have Judge Martin with us, and it will be unnecessary, I take it, to have any formal motion to extend to him all the privileges of the Association while he is with us.

It is now my great pleasure to introduce the Mayor of the great city of Gulfport, who has very kindly consented to extend to the Bar Association the welcome on behalf of the city.

MAYOR J. K. MILNER: Mr. President, and Ladies and Gentlemen of the Bar Association: I want to say that our city, while it is some size, in proportion is not nearly so great as we hope it to be in the next few years.

It gives me a great deal of pleasure, I assure you, to welcome you to our city, on behalf of the city and the officials of the city. I see some of the ladies here, and we always welcome the ladies with outstretched arms—figuratively speaking, however. We are mighty glad to have them with us.

Gulfport has made considerable progress in the last three or four years; in fact, since the G. and S. I. Railroad was taken over by the Illinois Central they have advertised us to the world, and made us believe more in ourselves down here; so much so, that we have gotten together, and decided to pull ourselves out of the rut, issue a lot of bonds and build us a sea-wall extending the length of the Mississippi coast, between the Bay of St. Louis and the Bay of Biloxi, costing us something like $3,400,000.00; we are building hard-surfaced roads throughout the county, and the city has a considerable road building program, from which we are now hearing. This is election week, the election being next Saturday. Necessarily, the taxes had to be raised, and we are now engaged in a great contest to see whether the political organization that had nerve enough to raise taxes will long endure. That will be determined Saturday of this week.

We have made material progress, as I stated. We were not satisfied. So far, about the result of it all is that we

have gotten a lot of notoriety as a resort. We like to believe that we are more than a resort. This is a commercial center. We have a port—we do not call it our port; we like to believe it is Mississippi's port—and we have not been able to get the whole State of Mississippi to recognize the fact that it is Mississippi's port; but we are working toward that end at present. We are very sorry that of all the cotton that is raised in Mississippi, not one bale was exported through the port of Gulfport last year. We have ship callings here weekly, and we have not been able to get hold of any cotton to ship out. Mississippi has built three great cities, New Orleans, Memphis and Mobile, all just outside the State limits, and we want to appeal to the good people of the State of Mississippi to wake up to the fact that they have a port of their own down here, and to realize that in building the port of Gulfport, they are in reality building for the State of Mississippi. There is a movement now on foot, which I hope will bring to our port some cotton and hardwood. Of course, it is a well-known fact that we have shipped—in fact, I believe last month was the biggest month we have had in ten years, so far as shipments of lumber are concerned; but if one will drive through the forests of South Mississippi, they will see that the sawmill has about gotten the best of the timber, and there is not much more of it; so we are looking out for something else to ship.

We are particularly glad to be able to welcome the members of the Bar Association to the Gulf Coast—to Gulfport in particular. If there is one thing Mississippi has been famed for it is her wonderful lawyers or statesmen, for throughout the years Mississippi has always been known for her ability in both Houses of Congress.

We are mighty glad to have you with us, and hope that your stay will be enjoyable, and that you will think enough of us to come and meet with us again. I thank you. (Applause.)

PRESIDENT WILBOURN: I have great pleasure now in introducing a gentleman who is already well-known to the Bar of Mississippi, the distinguished President of the Gulfport Bar Association, who will extend a welcome to the Association and its officers on behalf of the Gulfport Bar Association—Judge D. M. Russell.

JUDGE D. M. RUSSELL: Mr. President, Ladies and Gentlemen: In behalf of not just the Gulfport Bar Asso-

ciation, but the Harrison County Bar Association, it is my very great pleasure at this time to extend to you a very cordial welcome.

I assure you that we are very happy indeed to have you as our guests during this, the twenty-third Annual Session of the Mississippi State Bar Association.

After listening to the generous words of welcome extended by the City of Gulfport through our popular Mayor —and he wants to be very popular just now, as you have already discovered—I feel that it is not necessary really for me to add anything to what he has already so well expressed, only to say that as the Harrison County Bar Association we underwrite all that Mayor Milner has said, and we bid you a very cordial welcome on behalf of the Bar Association of this County.

Those of us who were so fortunate as to be present at the last meeting of the Association, held at Jackson, a year ago, remember with a great deal of pleasure the very cordial welcome extended us by the Hinds County Bar Association, through its able and distinguished President, Hon. W. H. Watkins; but we remember, however, that we were welcomed and received as prodigals returning to the father's house after straying away, as it was said, to Laurel and Biloxi for two years; they spread before us the fatted calf; they put the robe upon us; they brought forth the ring; but when we presented our finger to receive it, they reached for our nose, contriving and designing then and there to fasten us securely and permanently to the cradle in which our infancy was rocked. But the Mississippi State Bar Association had outgrown its swaddling clothes; it had attained its majority and come into the responsibilities of manhood's estate; it had explored the entire commonwealth, from Meridian on the east to Vicksburg on the west; from the Tennessee line on the north to the Gulf of Mexico on the south; it had heard the claims and offerings of all the cities and sections of our great State; but it chose to deliberately turn its face to the South, to the great Mississippi Gulf Coast, rapidly becoming the home of all the great conventions, where all the great organizations practically are going for their annual meetings, for deliberation and for diversion, and where they will all utimately make their permanent homes, where the convention fires never go out, and where the ships come in.

We are in the business of entertaining down on the Gulf Coast. Entertaining is big business with us. We have

all the facilities for entertainment, as our Mayor has said, hotels, play-grounds, driveways, fishing, boating, and in abundance. So, our Bar Association has joined the City of Gulfport in this invitation to the Mississippi State Bar Association, that you join the ranks of those who have come ahead of you, and make this your permanent convention home, and that is our further invitation. (Applause.)

And may I add that we are particularly pleased to have with us the members of the legal profession. Lawyers make such fine guests; they are always a cultured, jolly bunch, so easily entertained. In fact, they entertain themselves and the rest; and, to be frank with you, that's what we are expecting you to do this time. Therefore, we have turned over the City to you.

And may I add that we deem it an honor always to have with us the members and representatives of that profession, which has meant so much to every worthwhile movement that blesses the race today; that profession which is constantly making its contributions to every forward movement in the interest of society; that profession which is from year to year winning a larger place in the confidence and in the leadership of the public.

The Mississippi State Bar Association has a record for service, of which every lawyer, and I believe I may add every layman, is justly proud. May I say, in passing, that we pay a word of tribute to that noble line of Presidents of the Mississippi State Bar Association, under whose leadership we have been enabled to make this wonderful history. They are our Honor Roll. Some of them are here today. They began with Governor G. G. Shands, who was for many years Dean and Instructor of our great law school at the University of Mississippi, under whom many of us took our law courses. Prominent among them is the present incumbent, who has so industriously, so unselfishly, and so effectively devoted himself to the success of the Association. We honor them, one and all, living or dead.

Passing to our own Harrison County, about which you have been so well told by our Mayor, I may suggest that you are no strangers here. Two years ago many of you were the guests of our brethren of the Biloxi Bar. Our history isn't old, but it is a bit too old for our county to have been named after its most distinguished citizen; but I am sure you will all agree with me that our past has added enough lustre and honor to his home County to give

it a place in the South. (Applause.) But we have the honor to have as citizens with us a number of other distinguished men, among them being an ex-Governor, five ex-circuit judges and chancery judges, three ex-district attorneys, and the present able circuit judge and chancery judge of the district of which Harrison County forms a part.

Our Mayor has given you a resume of the unprecedented material development undertaken and largely accomplished in our County. He has told you how we protected our beautiful beach front all the way; he has told you how we have combined and consolidated this entire Gulf Coast, binding it together with bands of cement and steel, thus uniting our seven cities by the sea into one grand Riviera; and he has given you a suggestion of the great program of development yet unaccomplished, which will make for a greater Gulfport, and a greater Gulf Coast.

Our Mayor has turned the City over to the Bar Association. He means that the keys are in your hands. I think he has issued an order to these blue-coated, brass buttoned, fellows you sometimes meet on the streets to go fishing—make themselves scarce around here; let them know that the Bar Association is in session and that the Bar Association is going to have proper protection and for them to retire early, or if, perchance, they see some unfortunate fellow on the street, they are to do like the Pharisee of old, pass by on the other side, so that nobody is to be molested.

Judges White and Murphy have adjourned their courts for the Bar Association; they have ordered the Sheriff to close the courthouse, and that other institution that always sits hard by the courthouse, and throw away the keys, so that law and order will prevail without restraint during this Bar Association. (Applause.)

Judge Griffith is not holding a term of court here at this time, but if he were, I might say to you fellows who brought your wives along that they wouldn't have a chance to get a divorce in his court on account of any domestic disturbance that might arise during the sessions of the Bar Association. I want to say—and need not say on a damp day like this—that we have an equitable climate on the coast; it is one of our big assets; so, that I may assure you fellows from the hill country that it is dry enough here to be comfortable, and for you fellows from the delta that it is moist enough to remind you of Home Sweet Home.

I want to add for your comfort that we have no hard

and fast conventionalities down here to inconvenience anybody or embarrass anybody, so that if you country fellows forget and eat your greens with a knife nothing will be said about it; and if you fellows from the delta make the mistake of passing your glass instead of your plate for corn it is no breach of etiquette. Since our hotels understand and speak all languages fluently, they are familiar with all the rules of etiquette, ancient, medieval and modern. We have about fifty members of the Harrison County Bar Association; we have made them all a reception committee. They are here not only to show you courtesies, but absolutely to take orders. Every consideration will be given our guests. Information will be furnished you about any place or any thing you want to inquire about while you are in our City. They will be glad to serve you at any time, to make your visit happy, pleasant, and, we hope, profitable.

May I say finally that your ships have come in. They are at your disposal, crew and cargo; we bid you take possession and appropriate all to your fullest enjoyment. Forget your clients, your creditors, your reversals, even forget the late session of the Mississippi Legislature, if you can. (Applause.) And be assured of this: That in none of these hotels is there "Room 951", or that there will be any inquisition while you are here or after you have departed concerning your conduct during this Association. In fact, our attitude is very similar to that of the English nobleman who received notice from his most valued and trusty servant of his resignation. He was disturbed, and he inquired of his servant if there was anything he might do that would satisfy him to remain in the service. The servant replied: "Yes, there are three things." The nobleman inquired what they were, and the answer was: "Higher wages, less work, and the keys to your cellar." We cannot offer you any higher wages; we promise you less work, and the keys to our cellar, because it is empty.

The Mayor has put the keys of the City in your possession, so we bid you take possession, make yourselves at home, and make it permanent. (Applause.)

PRESIDENT WILBOURN: Judge Russell's remarks remind me of what occurred between the Mayor of Buffalo and the President of the American Bar Association last summer in Buffalo. The Mayor concluded his welcoming address with the remark: "Mr. President, I am delivering you the keys of the City of Buffalo, with the assurance, in-

cidentally, that it unlocks our cellar door''; to which President Whitman replied that from his observation of the members in his audience they had been getting along pretty well without that key.

It gives me great pleasure now to introduce to you a member of the Bar who will respond to these gracious words of welcome from the Mayor of Gulfport and Judge Russell; that gentleman is Honorable R. C. Stovall, of Okolona.

MR. R. C. STOVALL: Mr. President, Ladies and Gentlemen: ''If, indeed, there be anything in local association fit to affect the mind of man'', he would be no true Mississippian who could stand in your presence on this occasion and not be moved to thrill with pride in the State of his nativity. For, cross the confines of the Magnolia State from Tennessee to the Gulf, and from the mighty rolling Father of Waters to the lazy, meandering Tombigbee, and nowhere will you find a city more truly representative of the material progress of modern Mississippi and at the same time more redolent of the charms of the Old South than your City of Gulfport. Truly you citizens of South Mississippi are playing well your roles in the ''old proud pageant of man''.

And what colorful scenes in that pageant have been those enacted by your predecessors along this Gulf Coast. The same sun that shines so gloriously for us today shone once on the Indian lover, as he wooed his dusky mate by the musical waters of the Gulf; on the romantic Frenchman, as with courtly ceremony he flung to the Gulf breezes the silken banner of St. Louis; on the resolute Englishman, as he supplanted the lilies of St. Louis with the dragon of St. George; on swarthy pirate and on sturdy pioneer, as the reign of terror gave place to the reign of law; on the broken chieftain of the Confederacy, as he sought rest from the toils of war neath the ''braided gloom of your live-oaks''; on the stalwart railroad builders, as with pick and shovel they made ready the path of progress; and on the valiant seamen, as they have made the Gulf ports the gateways to Panama and to South America. These are but a few of the pictures in the pageant of South Mississippi's evolution from wilderness to paradise!

We are happy, most happy, to be with you. The sight of your marvelous development during recent years may well be an inspiration to us for the building of a bigger and a better Bar Association, which in turn shall help toward

the building of a bigger and a better Mississippi. It is indeed a privilege to hold our sessions here, to

"Laugh and be merry together, like brothers akin,
Guesting a while in this beautiful inn."

Wordsworth truly sings "It is in scenes like this we prize our memory", for it has power "To give new pleasures like the past, continued long as life shall last". Thus our apparently transitory joys become our permanent possessions, and thus we shall enshrine in our hearts your welcome and the pleasures of our stay among you.

For myself, and on behalf of the Bar Association, I thank you.

PRESIDENT WILBOURN: If you have tears, prepare to shed them now. Do not be perturbed, however, by the apparent size of this document I have before me, for I shall claim the privilege of the average Congressman of having my remarks extended into the records, so as not to burden you with all I have put down on paper.

The 1927 meeting of the Association was addressed by Hon. T. C. Kimbrough, Dean of the Law School of the University of Mississippi, on the needs of that institution. Members of the Association who were not so fortunate as to be present and hear it, have doubtless read it with profit and pleasure in the printed copy of the proceedings of the Twenty-Second Annual Meeting.

The Association voted to give its hearty endorsement and support to the matter of making adequate provision for the Law School of the University of Mississippi, and the President was directed to appoint a special committee, consisting of one member from each Congressional District, to co-operate in bringing the matter of relief for the Law School of the University of Mississippi to the attention of the Legislature.

In obedience to the direction of the Association, your President appointed the following committee:

Judge Stone Deavours, Laurel.
Judge E. O. Sykes, Jackson.
Judge J. H. Price, Magnolia.
Judge Webb Venable, Clarksdale.
Judge D. W. Houston, Chairman, Aberdeen.
Judge A. J. McIntyre, West Point.
Hon. Wall Doxey, Holly Springs.
Hon. J. H. Currie, Meridian.

This Committee and your President met with the faculty of the Law School, at University, on November 5th, 1927—Home Coming Day—and made personal inspection of the University Law School and its needs and adopted a suitable memorial on the subject to the Legislature, which was joined in by the Alumni Association at its meeting then in session.

Thereafter, the members of the Association, both in and out of the Legislature, took an active interest in obtaining adequate relief for the University Law School, and a great many letters were written by your President to various members of the Association in the counties of the State, requesting their co-operation.

I am happy to be able to state to you that one of the notable accomplishments of the Legislature recently adjourned, has been the passage of House Bill 1305 approved April 16, 1928, appropriating a million, six hundred thousand dollars for improvements at the University of Mississippi, whereby ample funds are available for the University Law School.

The activities of the Association in this regard are believed to have been helpful in obtaining such result and furnish a concrete illustration of the way in which the organization may be useful.

Pursuant to the action of the Association at its Twenty-Second Annual meeting, in June, 1927, a committee was appointed by the President to promote some action on the part of the Legislature of the State of Mississippi increasing the salaries of circuit judges and chancellors. The committee was composed of the following gentlemen:

Judge J. M. Stevens, Jackson.
Hon. Van Boddie, Greenville.
Hon. John W. Kyle, Sardis.
Hon. L. T. Kennedy, Natchez.
Hon. Walter Sillers, Rosedale.

Judge J. Morgan Stevens acted as the Chairman of the Committee.

The President of the Association conferred with this committee in Jackson and endeavored to render what assistance was in his power in the interest of providing increased and more adequate compensation for the circuit judges and chancellors. It developed that it was not possible or feasible to obtain any immediate relief for the present incumbents. However, by House Bill No. 1179, approved April 16, 1928, the salaries of circuit judges and chancellors were raised to $5,000.00 per annum.

The act provides that these benefits shall not apply to any circuit judge or chancellor during his present term of office.

Your Committee on Grievances has had quite a number of cases to handle and has devoted a great deal of time to the discharge of its duties. It is the hardest worked of all the Committees of the Association.

In connection with its report it will be well to consider ways and mean of stressing the ethical standards of the profession, and of more strongly emphasizing the requirement of good, moral character for admission to the bar. The members of the profession should be careful to be sure as to the moral qualifications of applicants for examination for admission to the bar before recommending them; and this association should

co-operate with the State Board of Law Examiners to prevent those unworthy and unfitted from entering the profession.

Your President discharged the duty imposed upon him of addressing the law class of the University. By authority of the Executive Committee the following subject was assigned for the contest for the Association's prize offered members of the University Law School for the best paper on some constitutional question:

"Has the Senate of the United States the constitutional right to refuse to seat a Senator who presents proper credentials from the State authorities showing his due election to the United States Senate?"

Your President visited Laurel and Hattiesburg Bar Associations through their courtesy, and was greatly encouraged and inspired by their live and energetic efforts to function in their communities.

The Mississippi State Bar Association is indebted to the local associations, the past officers, the various committeemen, vice-presidents and individuals who have so cheerfully aided in its work and manifested an interest in its activities.

NOTEWORTHY CHANGES IN THE FEDERAL STATUTES

At the time of the preparation of this address final and definite action has not been taken by the Congress of the United States on the most noteworthy measures that are challenging the general interest of the country at large. The Jones Flood Relief Bill; the Disposition of Muscle Shoals; the Bill to provide for the construction of works for the protection and development of the Lower Colorado River Basin, and for the approval of the Colorado River Compact ordinarily referred to as the Boulder Canyon Project, and the bill to establish a Federal Farm Board to aid in the orderly marketing and in the control and disposition of the surplus of agricultural commodities in interstate and foreign commerce, commonly referred to as the Haugen-McNary Bill, are all undetermined.

Certain measures of general interest have been enacted by the Congress to which brief reference will be made.

The writ of error in cases, civil and criminal, has been abolished and all relief heretofore obtained by writ of error shall hereafter be obtainable by appeal.

By an act approved January 26, 1928, $500,000.00 was appropriated by Congress for the employment of county extension agents, to be expended by the Secretary of Agriculture. The Secretary of Agriculture is authorized in co-operation with the several states and local agents within such states to continue or employ such county extension agents necessary to aid in quickly and adequately rehabilitating the flood devastated farm area.

By an act aproved February 7, 1928, the act of Congress establishing a Bureal of Animal Industry, and the act to enable the Secretary of Agriculture to more effectually suppress and prevent the spread of contagious and infectious diseases in live

stock; and an act to enable the Secretary of Agriculture to establish and maintain a quarantine district and regulate the movement of cattle and other live stock therefrom, were all amended so as to include in the provisions of each live poultry. The benefits of such acts are now extended to live poultry.

By an act approved March 7, 1928, $200,000.00 was appropriated by Congress to enable the Secretary of Agriculture to meet an emergency caused by a serious outbreak of pink boll worm in cotton in Western Texas, and to prevent its spread to other parts of Texas and the adjoining states, to be used in the eradication of the pink boll worm. This particular act is of peculiar interest to Mississippi.

By an act approved February 25, 1928, the President of the United States was authorized and requested to accept the invitation of the British Government to participate in the Eighth International Dairy Congress to be held in Great Britain during June and July, 1928, and $10,000.00 was appropriated for the payment of expenses of the delegates attending such congress. The delegates who shall attend such congress are required to make a report to the Congress of the United States as to the results and conclusions of the Dairy Congress. Owing to the greatly increased interest of the people of Mississippi in Dairying, this action of Congress is of general interest to the people of Mississippi.

By an act approved February 25, 1928, the jurisdiction over the administration and enforcement of all oil and gas leases on lands of the naval petroleum reserves issued pursuant to provisions of Section 18, Section 18-A of an act entitled: "An act to promote the mining of coal, phosphate, oil, oil shale, gas and sodium on the public domain", are hereby transferred to the Secretary of the Navy. The previous transfer of such jurisdiction from the Secretary of the Navy to the Secretary of the Interior marked the beginning of the most notorious and outrageous exploitation of the public property for private gain which has occurred within the history of the country. It should be a source of great gratification to the patriotic lawyers of the country, who love their profession and its high ideals, that the iniquity of the transaction was brought to light and exposed through the ability and persistence of some of the notable members of the profession, and that through the intelligence and fidelity of the judges of the courts, judicial condemnation has been fearlessly administered.

By an act approved March 8, 1928, the Post Master General of the United States was authorized to enter into contract for the transportation of mails by air, to foreign countries and to insular possessions of the United States.

By an act approved March 9, 1928, the Federal laws against unlawful restraints and monopolies were amended so as to provide that a private banker may be an officer or director or an employee of no more than two banks, provided there is in force a permit therefor issued by the Federal Reserve Board. And the

Federal Reserve Board is authorized to issue such permit if in its judgment it is not incompatible with the public interest.

By an act approved February 1st, 1928, it is provided that in the case of the death of a person by the negligence or the wrongful act of another, within a national park or other place subject to the exclusive jurisdiction of the United States, within the boundaries of any state, such right of action shall exist therein as though the place was under the jurisdiction of the State, and in any action brought to recover damages on account of injuries sustained in any such place, the rights of the parties are to be governed by the laws of the State where the death or injury occurred.

By an act approved March 9, 1928, provision is made for the sale of isolated or disconnected tracts of Government land, not exceeding one-quarter section.

By an act approved March 10, 1928, provision is made for settlement of certain claims of American Nationals against Germany, Austria and Hungary, and of Nationals of Germany, Austria and Hungary against the United States, and for the ultimate return of all property held by the alien property custodian.

NOTEWORTHY CHANGES IN THE STATUTE LAW OF THE STATE OF MISSISSIPPI

In and by Senate Bill No. 155, the consent of the State of Mississippi is given to the acquisition by the United States by purchase, condemnation or otherwise, of lands of this State, for custom houses, post offices or other public buildings, in accordance with the 17th clause, the 8th section of the first article of the Constitution of the United States. Exclusive jurisdiction over such lands for all purposes is ceded to the United States, except that the State retains a right to serve thereon all civil and criminal process issued under the authority of the State. It is provided, however, that such jurisdiction shall continue no longer than the United States shall own and use such lands for the purposes set forth.

It is further provided that such jurisdiction will not vest in the United States until it shall shave acquired the title to the lands. All such lands are exempted from all state, county and municipal taxation or assessment during the period of ownership thereof by the United States.

EXEMPTIONS GRANTED

Chapters 138 and 139 of the Laws of 1922 provide for the exemption from taxation for five years of tangible property of certain new factories and new enterprises of public utilities therein mentioned.

The purpose of such act was to encourage the industrial development of Mississippi. The legislature of 1928 has added to such chapter of the Laws of 1922 another section, which extends

the exemption to such new buildings or structures as may be hereafter erected by others for the purpose of being leased or rented, and actually leased or rented to such new factories and new enterprises of public utility for the sole use of such factories or enterprises, together with the lands necessary therefor.

With a view to encouraging and promoting the dairying and live stock industry in the state, an act was passed and approved, March 12, 1928, exempting from all state and county ad valorem taxes for a period of five years from such date, all cattle, sheep, goats and hogs in the State of Mississippi. The dairying industry has developed very rapidly in the State of Mississippi. Several large milk condenseries have been erected and are in operation.

Senate Bill No. 576, approved April 4, 1928, is entitled "An Act to encourage new enterprises of public utility so as to make certain additional exemptions from state and county taxation as herein provided, and authorize municipalities to grant similar exemptions, providing methods for obtaining such exemptions and for other purposes".

The new enterprises of public utility under the act are such as are engaged in interstate or intrastate transportation over or across any stream or body of water, public toll bridges, public ferries, public airplane lines used for the transportation of freight and passengers. The period of exemption is five years from the date of the charter, if the exemptionist is a corporation, and from date of the commencement of the work if the exemptionist is an individual or a partnership. As printed in the advance sheets of the Legislature of 1928, the first section of the act is not clear. The exemption granted is "From all state and county taxation, except state ad valorem taxation, income and privilege taxes on tangible property used in or necessary to the operation or the service of the industry". The exception seems to take away the exemption from state taxation first granted. The corporation or person claiming the exemption is required to make application to the auditor of public accounts, and the auditor, with the written advice of the attorney general, shall determine whether the property is exempted. In this latter particular, the act is not in harmony with Chapter 172 of the Laws of 1926, which provides that parties claiming exemption from taxation under any of the statutes of the state, shall make application therefor direct to the attorney general, and pay the fees therefor designated to the attorney general for passing on the question as to whether or not the property is exempt from taxation.

By House Bill No. 155, approved April 9, 1928, Chapter 347 Laws 1924, is amended so as to provide for the exemption of hotels constructed prior to January 1, 1932 from county and municipal taxation for a period of five years, at the option of the Board of Supervisors and the governing boards of municipalities.

By House Bill No. 101, approved April 19, 1928, section 1 of Chapter 139 of Laws of 1922, exempting certain new factories and new enterprises of public utility from taxation is still further

amended so as to include new water works plants or systems.

By House Bill No. 702, approved April 23, 1928, all hospitals or additions thereto, maintaining one or more charity wards, with at least twenty percentum of the total number of beds therein being exclusively charity beds, constructed prior to February 1, 1930, and all furniture and equipment therein, are exempted from all county and municipal taxation for a period of five years, at the option or discretion of the governing boards of such levee districts, counties and municipalities. The exemption begins with February 1st following the date of completion of such hospital or addition thereto.

By House Bill No. 1016, approved April 26th, 1928, factories for grinding and manufacturing agricultural feed stuffs and mixed feeds are exempted from ad valorem taxation for five years.

VALIDATION OF BONDS

By House Bill No. 466, approved March 21, 1928, some wise changes have been made in the law with reference to proceedings in the validation of bonds, certificates of indebtedness and other written obligations of counties, municipalities, school, road, levee and sea wall districts. The most notable of these changes are:

1. Unless written objections to the validity of the obligations involved are filed by a tax payer on or before the day set for the hearing of the proceedings, a decree approving the validity of such obligations is required to be entered, and such decree is declared to be final and forever conclusive from the date thereof, and no appeal whatever will lie therefrom.

2. In a case where written objections are filed by a tax payer and there is a hearing on the proceedings, if the chancellor enters a decree confirming and validating the obligations involved, and there is no appeal within the time allowed by the statute, to-wit, 20 days; or if on an appeal taken the supreme court enters a decree validating such obligations, the validity thereof shall be forever conclusive and shall never be called in question in any court in this state.

3. Whenever any bonds are validated under the provisions of the Act, the proper officer of the county, municipality or district issuing the same shall stamp or write on each of such bonds over his signature and seal, the words, "Validated and confirmed by decree of the chancery court" (or supreme court), together with the date of the rendition of the final decree validating such bonds. Such entry on the bonds shall be taken as evidence of the validation thereof in any court in this state.

4. In case written objections to the validation of the bonds is filed the chancellor is given discretion in taxing the Court costs as in other cases in chancery court. Such costs may now be taxed within the discretion of the chancellor either against the issuing board or district, or the objector or objectors, or such costs may be apportioned as the court may direct.

Under the new law the validation of such obligations is rendered much more speedy and efficacious.

BOXING BILL

By House Bill No. 306, approved March 27, 1928, boxing, sparring and wrestling matches, and exhibitions under the regulations and supervision of the Mississippi Athletic Commission,, established by the act, were legalized. Certain definite restrictions are imposed upon the sports therein allowed. They may not be engaged in on Sunday. They must be held under the supervision or subject to the rules and regulations of the Mississippi Athletic Commisssion. No boxing or sparring match or exhibition may exceed ten rounds of three minutes each. No seat or ticket to any such match or exhibition may be sold for exceeding $2.50. The Commission shall consist of three men, each of whom shall be a qualified voter and at least thirty years of age. They are to be appointed by the Governor from any patriotic organization chartered by the authority of special act of the Congress of the United States from a list of its members not exceeding 10 in number, submitted to the Governor by the Mississippi State Executive Committee of such organizations. The Commission is required to have a seal and is vested with the sole jurisdiction and control over all such sports conducted within the State of Mississippi. No such boxing, sparring or wrestling match or exhibition where an admission fee is charged therefor may be held without obtaining an order from the Commission authorizing it. The Commission is authorized, in its discretion, to grant a license or permit to any patriotic organization chartered by authority of the special act of congress of the United States, or any local unit thereof, colleges, universities and high schools. The Commission may not grant a license on any other applications than those named, nor to any such organization, or school or college which has not been in existence and held meetings at regular intervals for one year immediately preceding the granting of the permit. Provision is made for the payment of license fees for the granting of such permits. All contracts relating to any such exhibitions are required to contain a provision to the effect that the rules adopted by the Commission, either before or after the execution of the contract, shall be considered as a part thereof. The penalty imposed for a violation of the act is a fine of not less than $100.00 nor more than $500.00. The Commission is required to serve without salary, but shall have a secretary, who shall receive no more than $100.00 per month. The Commission is also required to maintain a general office for the transaction of business. Section 13 of the act provides that such boxing, sparring and wrestling matches in colleges, universities and high schools shall be exempt from the jurisdiction of the Commission, and shall be permitted and supervised by the governing body of such school, college or university.

By Section 9 of the act, any such boxing or wrestling match, or pugilistic encounter engaged in without first having obtained a license under the terms of the act is made a criminal offense. Every participant therein, on conviction shall be punished by imprisonment in the penitentiary not less than one year or by a fine of not less than $100.00, nor more than $2,000.00, or by imprisonment in the county jail not less than thirty days nor more than six months, or by both such fine and imprisonment.

By Section 10 of the act, wilful violation of the rules or regulations of the Commission relating to any such boxing, sparring or wrestling match as may have been permitted under the act, is punishable by a fine of not less than $100.00 nor more than $500.00. While by Section 14 of the Act, Section 1335 of the Code of Mississippi of 1906 is repealed, the Bar will note that the substance of Sec. 1335 of the Code of 1906 of Mississippi is incorporated in Section 9 of House Bill No. 306, and the same penalties against unlawful prize fighting are preserved as were contained and set forth in Section 1335 of the Code of 1906.

This particular bill was the subject of much controversy while it was under discussion in the Legislature. A great many of our good people differed in their opinions as to the wisdom of the act. It is to be hoped that no evil consequences will come from it.

HUSBAND AND WIFE TESTIFYING AGAINST EACH OTHER

By House Bill No. 558, approved April 1st, 1928, Section 1576 of Hemingway's Code of 1917, Section 1648 Hemingway's Code of 1927, on the subject of the competency of husband and wife as witnesses introduced by each other in civil and criminal cases, and in their own behalf as against each other, has been materially amended. There has been added to such statute the following proviso:

"But in all cases, except in controversies between husband and wife and divorce cases, and proceedings where either or both husband and wife are parties thereto, neither shall be competent as a witness with respect to any matters involved in said litigation without the consent of both husband and wife, and in all cases where husband and wife, or either, are parties, where interrogatories are propounded by will or otherwise to either or both husband and wife, neither husband or wife shall be required to answer same, or to make discovery of any matters involved in such case."

The phraseology of the proviso is not entirely clear. The consent of both husband and wife to either testifying appears to be required in all cases where either introduces the other as a witness except controversies between them in divorce cases, and proceedings where either or both husband and wife are parties thereto. The exception is so broad as to make it difficult to determine what classes of cases could possibly exist other than the excepted ones. If the consent of both husband and wife to

either testifying is not required in divorce cases and in proceedings between them, nor in any proceedings where either or both are parties, then it would seem that such consent is only required where some third party seeks to take the testimony of a married person. It is hardly possible that the legislature had that in mind. It does seem clear, however, that in all cases where the husband and wife are parties, neither shall be required to answer interrogatories propounded to them by bill or otherwise, nor to make answer to any bill for discovery touching the matters involved in the case.

ADMINISTRATION OF ESTATES

A noteworthy change in the law with reference to the administration of estates of deceased persons is contained in House Bill No. 385, approved April 4, 1928. This act amends Chapter 302 of the Laws of 1920, now Section 1847 of Hemingway's Code, by expressly providing that the filing of proof of publication of notice to creditors to probate their claims shall not be necessary in order to set the statute of limitations in motion against such claims. Such proof of publication, while required to be filed with the clerk of the chancery court where the cause is pending, may now be filed at any time before a decree of final discharge is entered. Under the statute, as it existed before the amendment, many members of the bar had proceeded upon the theory that the proof of publication of notice to creditors need not be filed with the clerk of the chancery court within six months of the date of the first publication thereof, but that it could be legally filed at any time before final decree. However, a majority of the members of the Supreme Court held in an opinion rendered April 25, 1927, in the case of Jennings, et al., vs. Lowry & Berry, 112 Southern, 692, that the failure to file proof of publication of notice to creditors within six months of the date of the first publication thereof, rendered the notice ineffective, and that where such proof of publication was not filed within six months of the date of the first publication thereof, the statute of limitations did not begin to run against the claims of creditors. Chief Justice Smith and Presiding Justice Ethridge dissented from the majority opinion. The legislature has now put the question forever at rest by an express declaration on the subject.

INSANITY NO LONGER A DEFENSE TO INDICTMENT FOR MURDER

The bar of the state and people generally have been very much interested in Senate Bill No. 1, approved April 3rd, 1928, which provides that the insanity of a defendant at the time of the commission of the crime shall not hereafter be a defense against an indictment for murder, and that the Court, in trials for murder, shall so instruct the jury; but that evidence tending to

prove the insanity of the defendant at the time of the commission of the offense may be offered in mitigation of the crime. If the jury in such a case finds the defendant guilty as charged in the indictment but insane at the time of the commission of the crime, they are required to say so in their verdict, and to fix the penalty at imprisonment in the state penitentiary for life. Should the jury find the defendant guilty as charged, but fail to agree on the issue as to whether or not the defendant was insane at the time of the commission of the crime, they are required to so state in their verdict, in which event the court is directed to fix the punishment as in any other trials for murder where the jury finds the defendant guilty but fails to agree as to the punishment. Provision is made in Section 2 whereby the trial judge may, in his discretion, certify to the Governor that in his opinion the mental condition of the prisoner is such that he should not be confined in the penitentiary, in which event the Governor is required to cause an investigation to be made by one or both of the superintendents of the state institutions for the care of the insane, and by other means which he deems proper. If the Governor becomes satisfied the mental condition of the defendant is such that he should not be confined in the penitentiary, he may order the transfer of the prisoner to one of the institutions for the care of the insane. In like manner the Governor, on information derived from the superintendent of any institution for the care of the insane, where such convicted person may be confined, may order the transfer of such person to the state penitentiary.

It has usually been regarded that an insane person is irresponsible and that his acts, by reason thereof, are not criminal. Insanity as a defense in a prosecution for crime, has heretofore been allowed in all cases on that theory. If the theory that an insane person is morally irresponsible is sound, then in no case should he be branded as a criminal. It is unjust both to the insane person and the innocent parties who bear his name to brand him as a criminal. Furthermore, the act is of doubtful constitutionality in this:

Insanity of an accused is still a good defense to an indictment for every other crime than that of murder. It may be argued that to allow a plea of insanity as a plea in bar to a prosecution for any other crime except murder denies the one accused of murder the equal protection of the law. Doubtless the legislature was influenced to adopt the act in question because of the frequent abuse of the plea of insanity in capital cases. The saner remedy for such abuses, however, lies in the improvement of our jury laws so as to place the intelligence and character of our citizenship in the jury box; and the devising of more efficient ways to prevent and punish the frequent and flagrant violations of the law against perjury. It has been facetiously stated that a correct definition of Americanism is: "Smart lawyers using gifted liars in an effort to impress dumb jurors." The activi-

ties of the profession and of the public at large in the interest of law enforcement may well be directed towards the punishment of some of the "gifted liars" of the country and the elimination of the "dumb jurors".

CHILD WELFARE

By Senate Bill No. 464, approved April 3, 1928, the Board of Supervisors in each county is empowered, in its discretion, to set aside out of the taxes levied and collected, to support the poor, or out of the county general fund, not to exceed $2,500.00 per annum, to be known as the Children's Aid Fund, for the purpose of providing a home, care and maintenance and support for dependent and needy children, payable upon the order of the Judge of the chancery court; this fund is not available for a child except where the parents or guardian or other person having the legal custody thereof is unable to provide for the proper care of such child in his own home. The child must be under sixteen years of age. Application for any benefits in the Children's Aid Fund must be made in writing to the Chancery Court, and must be heard and passed upon by the Court or Chancellor in vacation. The court shall make provision for visitation of the homes where such children are aided by representatives of the court to observe the conditions which obtain in the home and the care the child is receiving. The Court is required to keep on file a full report of each application for assistance under the act, and may make all such reasonable rules and regulations for its government as may be proper for the administration of the act. The Court in its discretion, may arrange with any local Child Welfare Agency, public or private, to administer the Children's Aid Fund, or may appoint a board of five citizens for such purpose, three of whom shall be women. Penalties are imposed upon those who obtain, through fraud, false representation or deceit, any assistance under the act. The dominant purpose of the act seems to be to provide, under the direction of the chancery court, for the care of the poor children of the county without taking them from their homes, and in such manner as to give them wholesome home environments. Child welfare is of paramount importance. It is certainly deserving of much more careful consideration than tick eradication or the protection of poultry and live stock. The health, education and moral welfare of the child should be the state's chief concern.

FLOOD RELIEF

The Legislature of 1928, very wisely and properly gave prompt attention to the rehabilitation of the flooded sections of Mississippi. Several bills looking to that end were adopted which are of great interest to our entire people, though immediately affecting only the Delta section of the State.

By House Bill No. 151, approved January 24, 1928, sales of

lands for taxes for the year 1927 in the flooded districts of the State, were postponed until the first Monday of June.

By House Bill No. 273, approved February 10, 1928, provision was made for the designation of the lands that were inundated by the flood of 1927 in the counties affected thereby so as to determine what lands would be entitled to the benefits of House Bill No. 151.

By Senate Bill No. 584, approved April 13, 1928, the Mississippi Re-habilitation Commission was created for the purpose of re-habilitating the flooded sections of the State. Provision was made for maintaining the public credit of the subdivisions of the state in such sections, and the issue of county and state bonds to carry out the purpose of the act was authorized. The provisions and terms of the issuance of such bonds are set forth in detail and authority given the Mississippi Re-habilitation Commission, in its discretion, to issue the said bonds of the State of Mississippi in a total sum of not exceeding $4,000,000.00 for use in accomplishing the purposes of the act. The problem of flood control is before the Congress of the United States, and a bill for the purpose of controlling the flood waters of the Mississippi is before that body. Our entire people will be rejoiced when Congress shall have made adequate and fair provision for the control of the flood waters of the Mississippi and its tributaries.

CORPORATION LAWS

Several noteworthy changes have been made in the corporation laws of the state.

By Senate Bill No. 137, approved April 4, 1928, Section 4114 of Hemingway's Code of 1917, has been amended prohibiting the formation of a corporation under the laws of Mississippi with the name of an existing corporation in this state, or the name of any company or corporation incorporated under and by virtue of the laws of any government, or of any other state or territory which may now or hereafter do business in this state, and which has heretofore filed or may hereafter file in the office of the Secretary of State a copy of its charter or articles of incorporation. Nor may such corporation be formed with a name so similar to that which any other corporation created under the laws of the State of Mississippi, or qualified to do business in this State, as to be misleading.

Section 2306, Hemingway's 1917 Code, as amended by Chapter 228 of the Laws of 1924; Section 2461 Hemingway's 1927 Code, with reference to the recording of mortgages and deeds of trusts is amended by House Bill 605, approved April 26, 1928 so as to provide that the failure to disclose the name of the beneficiary therein shall not prevent the recording of a mortgage or deed of trust given to secure the payment of bonds and certificates, participation in pledged assets and trustee's certificates as to an interest in an indebtedness payable to bearer. Before the passage of the amendment the only exception to the requirment that a

deed of trust or mortgage should disclose the name of the beneficiary therein in order to entitle it to be recorded was in the case of a mortgage or deed of trust to secure the payment of serial bonds payable to bearer. The exception has been broadened by striking out the word "serial" as qualifying the word bond and by extending the benefit of the exception to certificates of participation in pledged assets, and trustee's certificates of an interest in an indebtedness.

By House Bill No. 655, approved April 13, 1928, the law regarding the incorporation, organization and operation of corporations in the State of Mississippi was revised and modernized. The necessity for publishing the charter of incorporation once each week for three consecutive weeks prior to its approval has been removed. Corporations may be formed by the payment of the charter fee and the presentation of the proposed charter to the Secretary of State, who immediately refers the same to the Attorney General. The Attorney General is required to give his approval or disapproval thereof without delay, and refer the same to the Governor. As soon as the Governor shall have approved it he shall return it to the Secretary of State, who after recording it transmits it to the applicant. A charter, therefore, may be obtained in a very brief period of time. Publication of the charter is required to be made for only one week, and not until after it has been granted by the Governor. Provision is made for issuance of one or more classes of capital stock, with or without nominal or par value. Both common and preferred stock may now be issued under the terms of the act, either with or without nominal or par value.

Domestic corporations are required to maintain an office in the county where domiciled, in charge of an officer or officers, or some person designated as resident agent upon whom service of process may he had. Foreign corporations doing business in this state shall, on or before June 1st, 1928, file a written power of attorney designating the Secretary of State or an agent in this state upon whom service of process may be had in the event of suit against such corporation. A failure on the part of a foreign corporation to comply with the provision as to designating either the Secretary of State or an agent upon whom service of process may he had in this state has the effect of denying such foreign corporation the right to bring or maintain an action or suit in any of the courts of this state. Annual reports are required to be made by all corporations, foreign or domestic, doing business in Mississippi, on or before the 30th day of June of each year, showing therein the name, domicile, showing in which state the principal office is located within or without the state, the character of business, name and address of resident agent in this state, authorized capital stock, outstanding capital stock and names and addresses of its officers and directors. The fee for receiving and filing such annual reports is fixed at $10.00 per annum.

Sections 4070, 4145, 4112, 4150-B and 4098 of Hemingway's Code, the same being respectively 4484, 4529, 4560 and 4511 of Hemingway's 1927 Code, are all repealed. Section 4098 of Hemingway's Code 1927 repealed is the one that prohibited certain corporations from contracting debts in excess of their capital stock, and made the directors who contracted such debt individually liable therefor.

Such amendment to the law with reference to the incorporation of corporations is a constructive measure and will tend to increase the number of corporations organized under the Mississippi law. It will also greatly facilitate our domestic corporations in the setting up of their corporate structure without in any way working any harm or injury to the public.

TAX LAWS

By House Bill No. 1232, approved April 26, 1928, every person who is the owner of, or has possession of a diamond or pearl is required to make report thereof to the sheriff of his county; and any person selling any diamond or pearl is also obligated to make report of such sale to the sheriff. Under the terms of the Act jewelry stores making sales of such articles at retail are required to make reports of such sales under oath to the sheriff of the county. The sheriff is required to keep a record of such reports in a well-bound book, properly indexed. Such report shall be open to public inspection, and it is made the duty of the tax assessor carefully to examine such record before making up the personal assessment roll, and to assess the owner thereof with the diamonds and pearls reported to the sheriff at not less than the true value thereof.

By House Bill 849, approved April 11, 1928, Sections 4316 and 4318, of the Code of 1906, and Chapter 240 of the Laws of 1922, are so amended as to require the tax collector of the different counties in the State to make out on or before the 1st day of March in each year alphabetical lists of all persons in each district of the county subject to pay a poll tax who have not paid such tax on or before the first day of February of each year. Such list shall be sworn to by the tax collector and published in some newspaper in the county having a general circulation once a week for two consecutive weeks, the first publication to be made not later than the first day of March of each year; a copy of the list is also required to be posted at the courthouse, and the tax collector is required to furnish the board of election commissioners therewith within thirty days of every election. Heavy penalties are imposed upon the tax collector for failure to discharge the duties required in the act, and in addition thereto, it is made a misdemeanor for him to violate the act.

DAIRY LAW

By House Bill No. 1119, approved April 16, 1928, dairies, creameries, condenseries, cheese factories, milk and cream buying

and skimming stations, ice cream manufacturing plants, and plants for the sale and purchase of milk, cream, condensed milk, cheese and the by-products of same, and the substitutes thereof, in the State of Mississippi are regulated. All such stations are placed under the supervision of the Commissioner of Agriculture of the State. Numerous regulations tending to insure sanitary methods, and prohibit the use of foreign substances or coloring matters in such products, except for certain purposes, providing for the testing of such products, to punish false testing, to require licenses to be first granted to those engaged in the testing of such products, to prohibit incompetent persons from engaging in the testing thereof, are included in the act. Licenses for the buying of milk and cream are required. The sale and use of renovated butter is regulated. Provisions are made against discrimination in the purchase of milk and cream, and condensed milk, cheese, ice cream, and the by-products of same. Time would not permit a more detailed analysis of the act. It is undoubtedly in the interest of the public health and welfare.

PROHIBITION

By House Bill No. 1097, approved April 26, 1928, the sale of Sterno canned heat, and similar products, which may be used in any manner or any form so as to produce intoxication is made unlawful, and punishable by fine of not less than $100.00 nor more than $500.00, or by imprisonment in the county jail not less than three months nor more than six months, or by both such fine and imprisonment.

PROMOTION OF AGRICULTURE

By House Bill No. 873, approved April 26th, 1928, a simplified and inexpensive method of incorporating and operating agricultural associations was enacted. Provisions are contained in the bill intended to promote the general welfare of agriculture and to encourage co-operative activities in the rendition of service to the producers of agricultural products.

By Senate Bill No. 206, approved April 16, 1928, the Mississippi Agricultural Service Department was created, consisting of a maximum of fifteen members, composed of the Governor, Commissioners of Agriculture, and such of the following persons as may be qualified to serve and willing to receive appointment by the Governor, namely:

The State Director of Extension Work.

The State Director of Experiment Stations.

The State Director of Vocational Education.

The Dean of the School of Agriculture of the A. & M. College.

An executive officer of some agricultural association or society operating in the State for the promotion of the welfare of agriculture, or some of its branches.

And eight farmers actually engaged in agriculture, one from each Congressional District, to be appointed by the Governor, with the advice and consent of the Senate.

The Commissioners are to serve without pay; their terms of office are fixed; and the purposes for which the Commission is created are set forth in great detail in Section 5. Such purposes are principally to promote the general welfare of agriculture, and to co-ordinate, when practicable, all the agencies that are working for the development and improvements of facilities for marketing agricultural products; to promote the development of co-operative agencies; to encourage and aid in the inspection, shipment and sale of farm products; to gather and disseminate information necessary and helpful in facilitating the exchange or barter of agricultural products, live stock, machinery, implements and supplies and to do all other acts and things within the purview of the statute, which may be deemed promotive of its purposes.

FEEBLE-MINDED

An especially noteworthy enactment of the Legislature of 1928 is the passage of House Bill No. 591, approved April 16, 1928, providing for the sexual sterilization of inmates of insane hospitals and the Colony for the Feeble-Minded, under the conditions, and with the restrictions and limitations therein expressed. The bill is fashioned after the Virginia Law on the same subject. In the case of Buck v. Bell, 274, U. S. 200, 71 L. ed. 1000, the Virginia Statute was declared to be constitutional by the Supreme Court of the United States in the very able and interesting opinion rendered by Justice Holmes, with which, no doubt, the bar is familiar.

BUCKET SHOP LAW

By Senate Bill 552, approved April 26, 1928, the law with reference to bucket shop gambling in stocks, cotton, grain and other commodities, is revised and amended, and all laws or parts of laws regulating or prohibiting dealing in future contracts in conflict with, or inconsistent with the new act are thereby repealed. Under the new law bucket shops are prohibited, and contracts of sale for the future delivery of cotton, grain, stocks, or other commodities, which are to be settled according to or upon the basis of the published market quotations, or prices made on any board of trade, exchange, or similar institutions, upon which contracts of sale for future delivery are executed and dealt in without any actual bona fide execution, and the carrying out or discharge of such contracts upon the floor of such exchange, board of trade, or similar institution, in accordance with the rules thereof, are declared to be null and void, and uninforceable in any court of this State. It is provided, however, that all contracts of sale for future delivery of cotton, grain, stocks, or other commodities, made in accordance with the rules of any

board of trade, exchange, or other similar institution, actually executed on the floor of such institution, and perforced or discharged according to the rules thereof with a regular member in good standing of such an institution, organized under the laws of the State of Mississippi, or any other state, are declared to be valid and enforceable in the courts of this State according to their terms, provided such contracts also conform to the provisions of the United States Cotton Futures Act, approved August 11, 1916.

The organization of cotton exchanges, grain exchanges boards of trade, or similar institutions, to receive and post quotations on such commodities for the benefit of their members and other persons engaged in the production of cotton, grain, and other commodities, is authorized. Such associations are required to adopt a uniform set of rules and regulations not incompatible with the law, and to keep their books open to the inspection of proper courts and officers of the law when required. Members of such institutions organized under the laws of this State, or some other state, may provide for their use and that of their clients private or public wires from cities in this State to other cities without the State where such exchanges are operated, and receive for the benefit of themselves and their clients, or any person engaged in the production of cotton, grain, and other commodities, quotations and market news with reference thereto, and transmit for execution contracts of sale for future delivery. It is expressly provided: In all cases, it is contemplated that the delivery of the commodity purchased or sold, as the case may be, will be carried out by the principals, or their successors or assignees, and that the contract for delivery thereof will be performed or discharged according to the rules of the exchange, board of trade, or similar institutions, where the contract is executed."

Violation of this law is made a felony, punishable by a fine of not exceeding one thousand dollars, or by imprisonment in the penitentiary not exceeding two years; and any person convicted of a second offense may be both fined and imprisoned, in the discretion of the court.

A corporation violating the law shall be liable to forfeiture of all its rights and privileges as such, and it is made the duty of the Attorney General to institute proceedings for the forfeiture of the charter of any such offending corporation.

DISCRIMINATION IN GINNING CHARGES

By Senate Bill No. 665, approved April 26, 1928, it is made unlawful for chain operators of cottin gins, operating gins in two or more places in the State, to discriminate in price paid for cotton seed or ginning service, the necessary operating expenses, freight rates and other proper elements affecting prices being considered, and the effect of which would be to destroy, or

attempt to destroy, competition at either or any of such places in which such gins shall be operated.

It is provided, however, that a reduction in the charge for ginning service, or the payment of a higher price for seed in any locality, is lawful when done to meet legitimate competition.

Proof that a lower charge for the service in one locality than in another is made, or that a higher price for seed in one locality than in another is paid, differences of freight and other necessary expenses of operating the business considered, makes out a prima facie case of violation of the statute.

Penalties are imposed for the violation, which may be recovered by appropriate proceedings in the name of the State by the Attorney General or any district attorney, and a right of action is given to those who may be injured or damaged by the violation of the provisions of the act, to sue for and recover as liquidated damages, $100 per bale for the first five bales, and $10 for each successive bale thereafter ginned a day by the unlawful combination in competition with the plaintiff; the injured party may also have injunctive relief.

EDUCATIONAL

By Senate Bill 131, approved April 26, 1928, provision is made for the organization and operation of junior colleges. Under this statute, separate school districts containing a municipality with a population of not less than 10,000, or an agricultural high school that is not less than twenty miles distant from a State college, with the exception of Alcorn Agricultural and Mechanical College, are authorized to extend the curriculum so as to include the studies of the Freshman or Sophomore year, or both, of college work. Separate school districts, county agricultural high schools may unite with other separate school districts, or with other counties, in the establishment of a junior college. In the event a municipality desires to unite with other separate school districts, or with the county, in the establishment of a junior college, a provision is made for an election in the municipality on the question.

Where counties desire to unite in the establishment and support of a junior college, either with a municipality, separate school district, or other counties, an election is provided for to determine the question.

The minimum scholastic requirement of all teachers or instructors in such junior colleges is graduation either from the University of Mississippi, the Agricultural & Mechanical College, or the Mississippi State College for Women, or any college of equal grade; provided, that the teachers who give instructions in subjects for which Sophomore grade is granted shall have had in addition to graduation from such an institution post-graduate work in a university or college of recognized standing amounting to at least one year.

Students registering in junior colleges must have success-

fully completed at least fifteen units of high school work, and the junior college must be organized on a collegiate and not on a high school basis.

No school shall be rated or classified as a junior college unless it has at least twenty students registered for Freshman work only, and thirty-five students if both Freshman and Sophomore work are offered in such college.

The library in a junior college attempting to do Freshman work shall contain not less than one thousand volumes, well selected; if such junior college does both Freshman and Sophomore work, its library must contain fifteen hundred volumes. The library equipment shall have an aggregate value of not less than $2,000.00.

Junior colleges may deliver diplomas bearing the title of "An Associate of Arts" or "An Associate of Agriculture".

A Commission of Junior Colleges is created, consisting of the State Superintendent of Education as Chairman, and the heads of the University of Mississippi, the Agricultural and Mechanical College, the Mississippi State College for Women, and the heads of three junior colleges, to be selected by the junior colleges of the State.

By House Bill No. 1224, approved April 26, 1928, boards of supervisors are also authorized to appropriate money out of the general fund for the purpose of buying lands, personal property, or equipment of whatever nature or kind, for experiment stations, and to aid in the support and maintenance of such experiment stations, whether the same be located within or without the county. No such appropriation, however, may be made without submitting the question to a vote of the qualified electors of the county.

By House Bill No. 1079, boards of consolidated school districts, separate school districts, common schools, or agricultural high schools in the State, are authorized to make provision for the teaching of music in such schools.

By House Bill No. 24, approved April 26, 1928, provision is made for a continuous 8 months session of the public schools, provided funds are sufficient and the trustees and county superintendent approve that length of school term. Twenty days of actual teaching shall constitute a school month, and the number of hours of teaching that shall constitute a school day shall be fixed by the board of trustees of the school at not less than five nor more than eight hours. The eight months terms may be divided up into two distinct sessions by the trustees, with the consent of the majority of the patrons.

BEAUVOIR

House Concurrent Resolution No. 44, adopted April 16, 1928, provides for the appointment of a committee to confer with Mississippi Sons of Confederate Veterans regarding the anticipated

transfer of the property known as "Beauvoir", to the State of Mississippi. This Resolution reads as follows:

"HOUSE CONCURRENT RESOLUTION NO. 44

Providing for the appointment of a committee to confer with Mississippi Sons of Confederate Veterans regarding the anticipated transfer of the property known as "Beauvoir" to the State of Mississippi:

WHEREAS, on the 10th day of October, 1902, Mrs. Varina Jefferson Davis conveyed to the Mississippi Division of the United Sons of Confederate Veterans that certain property generally known as "Beauvoir" by a deed which provides in substance, among other things, that Beauvoir shall be kept and maintained as a home for indigent ex-Confederate Soldiers and Sailors, their widows and orphans and servants so long as it may be needed for that purpose; and

WHEREAS, the deed further provides for the conveyance of Beauvoir by the Sons of Confederate Veterans to the State of Mississippi when the same is no longer needed, to be used for its primary purpose, on condition, however, that in the event of such conveyance to the State the property shall be used for a State Military School, or for such other charitable or educational purpose as the owners may establish or maintain thereon; and

WHEREAS, the time is rapidly approaching when Beauvoir will no longer be needed for a soldiers' home and it now behooves the patriotic Mississippians to devise some plan for the ultimate and permanent use of Beauvoir, consistently with the conditions in the deed from Mrs. Davis and in keeping with the affectionate reverence which we have for the distinguished chief of the Confederacy;

THEREFORE, be it resolved by the House of Representatives, the Senate concurring, that a committee, composed of five members from the House to be appointed by the speaker and three from the Senate to be appointed by the presiding officer of that body, be named to confer with the Mississippi Sons of Confederate Veterans looking to the transfer of Beauvoir to the State on such terms and conditions as the said Sons of Confederate Veterans may be willing to approve in conformity with the conditions in the deed from Mrs. Davis, the said Committee to make report with its recommendations to the next meeting of the Legislature."

The matter of the future disposition of Beauvoir is one of keen interest to the people of our State. The home of Jefferson Davis should as speedily as possible be restored to the condition in which it was when occupied by that distinguished Mississippian, and kept and maintained as a patriotic shrine for all time to come.

COMMISSION ON REVISION OF TAX LAWS

By Senate Concurrent Resolution No. 30, passed by both the Senate and House of Representatives on April 16, 1928, a joint commission of seven members to be appointed by the Speaker of the House, two by the Lieutenant Governor and three by the Governor is created for the purpose of inquiring into, analyzing and investigating the whole taxing scheme and system of the State of Mississippi, and the management, operation and efficiency of all departments and functions of the State government, and to recommend such changes in the fiscal system of the State in the management and operation of its various departments and functions, as such commission may deem wise, to make report thereof to the Legislature not later than September 1, 1929. Such Commission must serve without pay, but its reasonable expenses shall be paid while in the discharge of their duties. The Commission may employ, to advise and assist it in its deliberations, persons expert in such matters, and pay therefor fair compensation, but the entire expense of the Commission shall not exceed $10,000.00, which shall be payable out of the respective appropriations for contingent expenses of the Senate and House of Representatives.

LABORERS LIEN LAW

By House Bill No. 937, approved April 16, 1928, any laborer, materialman, or architect, entitled to a lien under the materialman and laborer's lien laws of the State are entitled under such laws to give a stop notice to any owner, are given the right to reduce the claim therefor to writing, showing the basis thereof, the parties thereto, and the rights claimed, the description of the property sought to be bound, and swear to and file the same with the chancery clerk of the county where the property sought to be affected may be, after first notifying the owner in person, if a resident of the county, or by registered mail, if a non-resident, giving him a copy of the notice to be filed in the chancery clerk's office. The party availing himself of the statute must also make affidavit to the giving of such notice to the owner, and file it with the clerk of the chancery court; the clerk of the chancery court is required to record the claim in the lis pendens record, and thereafter it shall be notice of the lien to the owner and all persons. The aggregate amount of all such liens shall not bind the property to an amount greater than the original contract price, or the amount of the owner's liability thereunder at the time notice is filed. If the aggregate amount of the liens claimed in such notice exceed the balance due by the owner they shall be paid pro rata.

Penalties are imposed for falsely and knowingly filing the notice without just cause. The right is given to any person adversely affected by the filing of such notice to apply on two days notice to the chancery court, or to the chancellor in vacation, or to the county court, if within the jurisdiction amount

granted to such county court, to expunge such notice from the record.

Provision is made for cancellation of such notices when the lien is paid or extinguished. The filing of the notice does not extend the life of the lien beyond the period allowed by the statute within which to enforce the same by legal proceedings.

TICK ERADICATION

By House Bill No. 1001, $550,000.00 is appropriated for the use of the Live Stock Sanitary Board for the years 1928-1929, in the work of tick eradication, and the fighting of hog cholera, bovine tuberculosis, and other infectious, contagious and communicable diseases of live stock. The appropriation is conditioned that Chapter 263 of the Laws of 1926, known as the Statewide Stock Law, be not repealed or amended, and that all funds shall be accounted for in a detailed statement showing when, to whom, and for what purpose applied, which shall be submitted to the Legislature at the next regular session, within ten days after the convening date.

Of interest to the Bar is the further condition embodied in this statute that the appropriation is made upon the proviso that "no part of such fund shall be expended for lawyers' fees or legal expenses".

By House Bill No. 1075, approved April 19, 1928, Section 1799 of Hemingway's 1917 Code is amended so as to provide that where the executor, or administrator, or guardian also acts as the attorney for the estate of which he is such executor, administrator or guardian, the court may allow a reasonable compensation for such attorney for his legal services in lieu of fixing his compensation as executor, administrator, or guardian.

STATE COMMISSION FOR THE BLIND

By House Bill No. 888, approved April 18, 1928, a State Commission for the blind is created, consisting of five members, of whom two shall be the State Superintendent of Education and Secretary of the State Board of Health, and three shall be appointed by the Governor. The Commission shall serve without compensation, other than their actual expenses.

The Commission shall maintain a bureau of information, the object of which shall be to aid the blind whose training is not otherwise provided for, in finding employment and in developing home industries among them, and in marketing their products.

It may in its discretion furnish materials and tools as a means of rehabilitating such blind persons, and may establish shops, work-shops, and through the employment of teachers give instructions to such blind persons in their homes.

The Commission may also register cases of persons whose eyesight is seriously defective, and who are likely to become visually handicapped and blind, and may take measures in co-

operation with other authorities as it may deem advisable for the prevention of blindness, or conservation of eyesight, the education of blind children, and the vocational guidance of blind adults

INHERITANCE TAX LAW

By House Bill No. 1205, Section 3, Chapter 134, of the Laws of 1924, imposing an inheritance tax upon the estates of deceased persons, is amended as to the percentages imposed on the various amounts of net estate in excess of $50,000.00; percentages are imposed on such estates ranging from four-fifths of one per cent on the first $50,000.00 of taxable net estate, to 16 per cent upon the amount by which the net estate exceeds $10,000,000.00.

This act manifests the hopeful outlook of our Legislature with reference to the future increase of wealth of the inhabitants of Mississippi. Let us hope that it is truly prophetic. The net taxable estate is arrived at by deducting from the value of the gross estate the sum of $100,000.00; thereafter no tax is due unless the net estate exceeds $100,000.00.

The intangible property of non-residents of the State of Mississippi found within the State is exempt from the tax, provided the laws of the State of the domicile of such non-resident deceased person exempts from the provisions of state inheritance tax the intangible property of a resident of the State of Mississippi.

By Section 5 of the Act, it is provided that it shall remain in full force and effect so long as the Government of the United States retains in full force and effect as a part of the revenue laws of the United States a federal estate tax and that this Act shall be repealed as when the Government of the United States ceases to impose an estate tax.

WAR ON MOSQUITOES

By House Bill No. 1157, approved April 23, 1928, boards of supervisors in any county in the State are authorized to establish county mosquito control commissions, and to define their duties and powers. The board of supervisors may appoint three persons to constitute such commission, with the approval of the State Health Officer, who is an ex-officio member of each commission that may be appointed by any county.

The commission is created a body politic, with power to sue and be sued. The members of the commission must serve without compensation, except necessary expenses for actual attendance on meeting, a per diem of $5.00 per day, the total per diem compensation not to exceed $25.00 per month.

The Commission may accept, with the approval of the State Health Officer, any aid whatever from any source, calculated to further the plans and purposes of the Commission.

The Commission is given power to eliminate all breeding and producing places of mosquitoes within the county. Nothing in the act shall be construed as in any way altering, amending,

modifying or repealing those laws of the State which confer upon the State or local boards of health their powers.

CODE COMMISSION

By House Bill No. 16, approved April 26th, 1928, the Governor was authorized and directed to appoint three suitable persons, one from each Supreme Court District, learned in the law, as commissioners whose duty it shall be to revise, arrange and classify all the statute laws of this state of a general nature into one code, including all such laws of a general nature as are now in force and that may be passed at the present session of the Legislature, and index the same. The Governor has appointed three able and distinguished lawyers of our state to constitute the Code Commission in the persons of Hon. J. M. Stevens, Hon. V. A. Griffith and Hon. C. Lee Crum. Just how much the Code Commission can accomplish by way of a general revision of the law so as to include other needed legislation and eliminate such statutes as should be repealed will depend upon how broad a construction can be placed upon the words "to revise, arrange and classify all the statute laws of this state"

By House Bill No. 1101, which failed of passage, doubtless because the Legislature concluded that House Bill No. 16 was sufficient for all the purposes contemplated in House Bill No. 1101, it was sought to create a Commission on Law Revision with the duty "to make a careful study of all general statutes of the State and opinions of the Supreme Court of Mississippi; to prepare and deliver to the Secretary of State at least sixty days before the convening of each regular session of the Legislature a biennial report to the Governor and Legislature, calling to their attention such general statutes as in the opinion of the Commission, may be conflicting, of doubtful meaning, unconstitutional, obsolete or having a tendency to unduly complicate the administration of justice or work a hardship or for any other reason require revision; also in such report to set forth such additional propositions not embraced in the general statutes and not definitely settled by decisions of the Supreme Court as in the opinion of the Commission may require legislation in the interest of certainty in the law; also in such report to submit drafts of such amendments, revisions, and acts as the Commission may recommend for enactment together with the reasons of the Commission for recommending each; also drafts and revisions of such acts as may be referred to the Commission by either house of the Legislature for that purpose". House Bill No. 1101 also sought to make it the duty of each judge, chancellor, state and county officer to cooperate with such commission in its work and to call to its attention general statutes which require revision.

GENERAL REMARKS AND SUGGESTIONS

The Clerk of the House of Representatives, Hon. Geo. B.

Power, has compiled and given out some interesting data as to the work of the 1928 Legislature. Two thousand and sixty-six measures were introduced during the session in both houses. Seven hundred and ninety-two of these were finaly passed and approved by the Governor. Twenty-four bills were carried over by the Governor without his signature. Sixteen were vetoed. It is interesting to note that approximately two-thirds of the suggested law failed of passage. The large number of bills introduced indicates the strong disposition that exists to remedy every supposed evil with some character of legislation. The number of such measures that failed of passage shows the conservation and wisdom of the legislators. The Legislature of 1928 may well be commended by the public for the legislation it did not enact, as well as for the many constructive measures to which it gave its approval.

The Legislature of 1928 made total appropriations in excess of $5,000,000.00, but failed to agree among themselves and with the Governor on adequate measures for raising the necessary revenues to pay them. A special session for that purpose is in prospect and will doubtless be held within the year. The committee provided for by concurrent resolution to study and suggest a revision of the state's fiscal system will doubtless immediately address itself to this pressing problem. This committee should receive the hearty co-operation of the Association and all its members and committees, in an earnest and patriotic endeavor to accomplish a solution in the interest of the public welfare.

The Mississippi State Bar Association has before it many challenging tasks, which should be esteemed as high privileges. Some of these should constitute the objectives for the coming year. Mention will be made of a few of them by way of suggestion—

First—The problem most intimately connected with the House Bills 16 and 1101 referred to were both directed to that end. Life of the profession is that of Law Reform. It is indeed as the Constitution of the Code Commission clearly recognizes. Peculiarly the lawyers' task. Just as the medical profession constantly seeks to advance in scientific methods of treating the physical body, so the legal profession should co-operate to promote the health of the body politic. The lawyers are better informed than any other class of our citizens as to what laws need reforming. They know better how to accomplish the necessary changes. They can be the most influential advocates of reform measures. They have the opportunity to mold a wholesome public opinion on all such questions. How may the profession best serve in this regard? The following concrete methods are suggested:

(a) By a more coherent and representative organization of this Association. If every reputable lawyer in Mississippi would become a member of the Association, and support its program and

activities, and lend his presence at its meetings, the Association could function much more efficiently. If all the members of the profession in the larger towns and cities were well organized, held at least quarterly meetings, and affiliated and co-operated with the State Association, its work and influence would be more manifest and more generally felt and recognized. Unless we all pull together in an earnest effort to maintain an organization that can express and enforce the consensus of opinion and the ideals of the profession, we can not expect to wield a large influence for good. It is only through co-ordinated, sympathetic, organized effort, through local associations affiliated with and supporting the State Association, that we can crystallize, maintain, and express the professional psychology essential to the accomplishment of worth while law reform. As a profession we must frequently express, zealously guard, and fearlessly enforce the high ethical standards we say we are devoted to, and we cannot do so effectively except through some organization with the power to speak for and represent our united membership.

(b) By a more earnest, diligent, and thoughtful attention to the subject of law reform. Concretely, we may, and should, take more interest in the work of the American Bar Association, and that of the various sections into which it is subdivided. The activities of the American Bar Association are of vital interest to the profession and the country at large. More active and cordial interest in the work of that association would increase our usefulness to the people of our State. The work of the American Law Institute in its laudable endeavor to restate, simplify and clarify the law, deserves the sympathy and intelligent interest of every lawyer. The American Law Institute invites our co-operation. It needs our assistance and support, not financially, but by way of intelligent consideration of their work, and the contribution of such helpful suggestions as occur to us. It was a source of great regret to your President that he was not able to attend the meeting of the Institute in Washington last week. Our distinguished Chief Justice did attend, and indeed for several years has not missed a meeting. Other members of our State Bar attended the meeting whenever possible. A conference of Bar Association Co-operating Committees called by the Executive Committee of the Council of the American Law Institute was held in Chicago in October, 1927. This Conference unanimously adopted the following resolution:

"Resolved: (1) That this Conference suggest to State Bar Associations that they try by way of experiment, the preparation and publication by State Bar Associations of editions of the Restatements embodying local annotations.

"2. Such annotations should cite all relevant local decisions and statutes and indicate their agreement or disagreement with the rules of law as stated in the Restatement. It should also indicate those instances in which there is no local authority.

"3. It is further recommended that the person or persons

to prepare such local annotations be chosen by the respective committees on co-operation with The American Law Institute or officers or governing boards of such Associations, and that the work done be under the supervision of these committees with the co-operation and advice of The American Law Institute.

"4. We further recommend that annotated editions of the Restatments be published by the State Bar Associations, and that copies thereof be sent without individual expense to all members of such Associations."

This subject should receive the careful consideration of the Association at this meeting.

(b-2) By making provision for a law journal of the Association.

It is highly desirable that the Association should publish a journal through which it could give official expression of its views, and by means of which it could more easily enlist and retain the interest of its individual membership. The Secretary of the Association, Mr. Jiggitts, has suggested a way whereby this may be possible. The Minnesota Association and the University of Minnesota Law School issue jointly a monthly journal known as the Minnesota Law Review, and designated also as the journal of the State Bar Association. It is suggested that this Association arrange for a quarterly law review and journal on the same plan. One number, the summer edition, could contain the proceedings of the annual meetings. The Association could publish such proceedings as cheaply in such journal as they now can in a separate volume. The Association could name a Board of Directors of the journal among whom should be the President and Secretary of the Association, the Executive Committee of the Bar Association, with the Dean of the University Law School as Chairman. The Board of Directors could name a student editorial staff, who would function directly under the Dean of the Law School. The American Law Institute's Restatements of the Law could be annotated by University Law students under the direction of the faculty of the Law School, and such restatements annotated, could from time to time be published in the journal. What is normally spent by the Association in publishing its proceedings, plus advertisements and a small subscription charge would furnish the financial support for such journal. In such journal there should be published the paper of the winner of the Association's prize for the best essay on a topic submitted by the Association, and also the address of the Association's President to the University Law School, together with such other addresses and papers as are from time to time submitted to the Law School. News of the State Law School, reviews of the current State and United States Supreme Court Decisions, and discussions of timely topics of interest to the Bar, and tending to promote high ethical ideals, and a proper attitude toward law reform would constitute further material for the

pages of such journal. I hope the Association will consider and act upon this suggestion before adjournment.

(c) By appointing a Committee from this Association to co-operate with the Code Commission appointed by the Governor by authority of the Legislature. This Commission is composed of three distinguished members of the Association, Hon. J. M. Stevens, Hon. V. A. Griffith and Hon. C. Lee Crum, who no doubt would welcome suggestions from a committee appointed by the Association. The Association rendered great assistance in the framing of the Chancery Practice Act, Laws 1924, Chapter 1924. It can be of great service to the State by aiding sympathetically and intelligently in a general revision of the laws. Time will not permit the mention of all the matters needing attention, but a few may be referred to.

The law as to jury trials needs revision. The profession is blamed when the public feels the jury has not administered justice. In proof of this a recent instance is cited.

A great daily newspaper of our State, commenting editorially upon the acquittal of Mr. Harry F. Sinclair, said:

"The jury knew nothing of the supreme court decision which openly declared that the arrangement between Sinclair and Fall was shot through with 'pollution, fraud and conspiracy'.

"Attorneys for Sinclair 'cooked up a statement' from Albert C. Fall setting forth his side of the case. Albert Fall never appeared before the jury.

"Sinclair, himself, who declined to take the stand in his own defense, relied upon his silence to befuddle unknowing jurymen.

"Apparently little was submitted to the jury that would give the jurymen information upon which to reach a just conclusion. As a matter of fact, the jury, after having heard all the evidence as presented, knew less about the case than the average citizen who reads the daily press.

"On top of this, million dollar lawyers, adepts in the art of twisting evidence and making black seem white, left no trickery untried to confuse and mislead the jurymen.

"The jury, lost in the intricacies of legal verbiage, found one course of procedure—to set the prisoner free.

"All this is an indictment of our system of jurisprudence—a system that hedges court procedure with archaic rules and regulations, designed more to protect the criminal than to fulfil the the demands of fairness.

"Our modern court method places 'blinds' on the jury. The very courts seem to conspire in favor of the prisoner and against the right and the defense of organized society."

Whether the distinguished editor is correct or not, the profession should bestir itself to remove any occasion for such charges.

It is notorious that too few of the most intelligent and high-minded citizens are called for jury service; or, if called, are allowed to sit. Under our practice it is difficult for one who

has heard of the case or knows the parties to qualify for jury service. The names of many business men whose experience with men and affairs have qualified them to pass understandingly on the issues submitted are never put in the jury box. Oft times, if they are called as jurors, they urge press of business as an excuse for not serving. The method of drawing the names out of the jury box precludes the Court from sending the sheriff out to summon men who are known to be qualified to try the particular issues involved. As far back as the 13th Century it was the practice in England to summon experts from particular trades as jurors on issues with which they were familiar—for instance, cooks and fishmongers to try a man charged with selling bad food, and merchants to try a case between merchants. Enough care and time is not always taken to see to it that the law and evidence is clearly presented and fully explained to the jury. There is not always any pains taken to give the jury a due sense of their responsibility and duty. Provision should be made by law for waiver of jury trials in purely contract cases. Our system of pleading the general issue and thereby putting the plaintiff to proof of facts not really disputed should be revised. Allegations not specifically denied should be taken as admitted. Stipulations as to undisputed facts should be encouraged, and the issues submitted to jurors should be simplified as much as possible. It is folly to consume the time of expensive courts developing facts not in controversy. The trial of cases should be made less expensive, speedier, simpler. Appeals should not be allowed except on showing of probable substantial error to the prejudice of the party praying for appeal. The independence, impartiality and integrity of both court and jury should be zealously guarded and preserved.

(d) By the members of the profession fostering and upholding by word and example respect for law and the courts, and a wholesome public opinion for law enforcement.

The maintenance of high ethical standards for its members, the fearless exclusion of those who violate them and prove unworthy of their trust, the condemnation of mob violence, insistence upon clean and honest government, and the support of the Constitution, are all peculiar functions of the Bar. In a recent article in "The American Mercury", Mr. H. L. Mencken has attacked very vigorously the law and the lawyers. He says in part as follows:

"But today the law has lost the blood of life and become a fossil, and its practitioners have petrified with it. Reduced to plain terms, what they engage in for a living is simply nonsense. It is their job, not to dispose of that nonsense, but to preserve it, pump it up, protect it against assault. So consecrated, they spend their lives in futility, and pass into oblivion unregretted and unsung.

"The situation of the lawyer, I believe, is worse in the United States than elsewhere, and for a plain reason. Our written

Constitution, by cutting off legal speculation and experiment in the precise fields wherein such adventuring is most tempting and useful, has reduced the science of jurisprudence to purely historical interest, and made all lawyers the slaves of words. In England a judge may still decide a so-called constitutional question by a rational process; he may bring to its solution, not only the letter of statute and precedent, but also the spirit of justice and reason. But in the United States he is bound by a text, and every year that text grows more rigid and inconvenient. Justice has no place in it, nor reason; it is simply a series of unyielding mandates. Some of those mandates, at an early stage, were found to be unworkable, and so the courts had to find ways to get around them. But it was not possible to get around them by setting the principles of injustice and reason against them; the business had to be achieved by the arts of casuistry and obfuscation, of what on other planes would be called hypocrisy and trickery. Black had to be interpreted as meaning white, and no had to be transmogrified into yes. The result was comfort under the collar, but it was also an evil glitter into the judicial eye. A judge became an officer told off to uphold the preposterous so long as it was humanly possible—and then to get rid of it by substituting the fraudulent."

This indictment of the lawyers and the Constitution is quoted not to endorse it, but to condemn it, and to point out that the real answer to such assaults must lie in the future character and achievements of the profession. The profession must by the service it renders and the personnel of its membership demonstrate its right to be classed as learned and honorable.

There is no social idea of value that does not sooner or later draft upon the lawyer, either for its expression or its advocacy.

There is no great public question of government but challenges the talent and interest of the lawyers to its profit.

There is no reform movement but finds among its staunchest supporters the members of the bar.

There is no great business enterprise that does not profit by his training and ability.

There is no problem of modern life which may not be helped and is not helped by the lawyers of the land.

In any great world court for the settlement of disputes among nations, as private controversies are now disposed of, the lawyer will draft its governing provisions and its methods of procedure, will present the arguments and briefs upon which its decisions will be based, and will formulate its judgments.

The growing ideals of democracy will in every land in the coming years be expressed and defended by patriotic lawyers.

The progress of the world toward a larger measure of social and industrial justice will be reflected in laws written, advocated, tested and enforced by lawyers.

The responsibility and opportunity of the legal profession are great enough to challenge the highest endeavor. There is

no intellect, however bright, no character however strong, that may not find inviting and congenial labor in following the calling of the law. The preservation of social order, the molding of worth while public opinion, the enforcement of the law, the development of the great business interests of a great country, the contributing in some degree toward the solution of the problems of the race, the furtherance of human progress, the defense of human liberty, are undoubtedly things worth while. It is the proud privilege of every lawyer to leave behind him as his most enduring monument a record of zeal and helpfulness in advancing each and all of these great causes.

It depends upon the character, intelligence and patriotism of the bar, and the purity and unselfishness of the motives that actuate them, as to whether or not their influence shall wane. So long as they are true to the eternal verities, and labor with a true vision of their glorious task they will be worth while.

"Love thou thy land, with love far-brought
From out the storied Past, and used
Within the Present, but transfused
Thro' Future time by power of thought.

"But pamper not a hasty time,
Nor feed with crude imaginings
The herd, wild hearts and feeble wings,
That every sophister can lime.

"Deliver not the tasks of might
To weakness, neither hide the ray
From those, not blind, who wait for day,
Tho' sitting girt with doubtful light.

"Nor toil for title, place, or touch
Of pension, neither count on praise:
It grows to guerdon after-days:
Nor deal in watch-words over-much:

"Not clinging to some ancient saw;
Not master'd by some modern term;
Not swift nor slow to change, but firm:
And in its season bring the law:

"That from Discussion's lip may fall
With Life, that, working strongly, binds—
Set in all lights by many minds,
To close the interests of all."

PRESIDENT WILBOURN: We will re-assemble at two o'clock, at which time we will be favored by a paper from Hon. Paul Chambers, and after that the various reports of committees will be given, and then we will prob-

ably adjourn about five o'clock. I will ask Judge Russell to make some announcements about the entertainment for the afternoon and evening.

JUDGE D. M. RUSSELL: I will ask Mr. Taylor, Chairman of the Entertainment Committee, to make those.

MR. TAYLOR: If there are those among you who belong to the Kiwanis and want to attend today, you may do so at the Roof Garden at 12:05 o'clock; if there are those among you who are Rotatians, you may make your arrangements to be at the Great Southern. They meet there at 12:05.

The ladies have arranged to entertain the visiting ladies at 2:30 on the mezzanine floor. I think they are going to play cards.

At 5:00 o'clock we have arranged to take an automobile drive to see some of these streets Mr. Milner told you about, observe the sea wall, and go to Gulf Hills, where there is being spent about $15,000,000, in improvements. We will leave at five and get back at six thirty o'clock, if you are willing to exceed the speed limit.

Tomorrow morning the ladies will afford such entertainment as the visiting ladies may indicate will be agreeable to them.

Tomorrow afternoon at two o'clock we will take an inspection tour of the harbor and the islands round about on the Non Pariel.

This evening, as has been announced, we will have the Ball, and I hardly need to make more mention about it than you know from the program. Permit me to say, if you don't see what you want, ask for it.

Upon motion made, seconded and carried the Association adjourned until 2:00 o'clock p. m.

The Association was called to order at two o'clock p. m. by the President.

PRESIDENT WILBOURN: My friends, we will now be favored with a paper on the new corporation law, by Hon. Paul Chambers, of Jackson, Mississippi.

PAUL CHAMBER'S ADDRESS

1. My subject is the so-called New Corporation Act, as approved April 13, 1928. That designation, is, to a certain extent, incorrect, as it is new only as to organization of certain corporations and other features put into our laws for the first time, the greater portion of our corporation laws remaining unchanged.

2. As to those parts which do remain unchanged there are probably many of you here who are much better qualified to

speak than I, though as to those new features I am, prehaps, more familiar with them than most of you.

3. Something over two years ago, or when the 1926 session of the Legislature was being held, my partner and I, in an effort to modernize the Mississippi law, in certain respects, undertook and did prepare a bill to be introduced at that session, which was the same as the Act passed this year, except for certain additions and improvements suggested here and there, and while the bill was introduced it was not followed up and never reported out of the committee.

4. Most of the lawyers in Mississippi who have handled any considerable amount of incorporating work have, on many occasions, incorporated under the laws of states other than Mississippi, principally Delaware, because of certain advantages which they have considered the laws of those states offered. As a result many thousands of dollars have been sent out of Mississippi every year, not only to cover the original incorporating expenses in those states, but to maintain resident agents therein, and to pay annual taxes thereto. If I am not mistaken, Delaware receives enough taxes from corporations to maintain its entire state government and has no other form of state taxation. Then, when such corporations were organized and came to do business in Mississippi it was necessary for them to pay the same fees to the Secretary of State for qualifying here as it would have cost them to incorporate here in the beginning.

5. One of the principal advantages to be secured in other states was the right to issue different classes of capital stock. While there was no prohibition, there was no express provision in our Law even for the issuance of preferred stock, though a number of corporations have been formed here with preferred stock, with the approval of the Attorney General. But there was no direct warrant for it in the law and most lawyers have been somewhat afraid of it, where occasion for its use arose. But the principal advantage in Delaware, New Jersey and other states was the right to issue stock without nominal or par value, which within the past ten or fifteen years has been authorized by the legislatures of over forty of the states, having been first authorized in New York in 1912, since which time its popularity has been steadily increasing to the point where a majority of the larger corporations have adopted it.

6. Some objections have been voiced against this stock without par value, but usually after a more thorough study of the subject, most critics have come to realize that it much more nearly represents what a share of stock in a corporation should represent than does stock bearing a dollar mark. Take for instance, any corporation organized with capital stock having a so-called par value of $100.00. Any time after it begins business its stock is worth either more or less than $100.00, for there is practically no corporation at any time after its entering upon its existence whose stock is worth exactly $100.00, whereas no

par value shares are simply what they appear to be, that is, evidence of pro-rata interest in capital and earnings, whatever they may be.

7. It has been thought by some that no par value shares would encourage stock jobbing of one kind or another, but I believe it is true that they deprived promoters of the advantages of inflating capitalization and the misrepresentation that may be brought about by dollar values on shares. With no par stock everyone is put upon notice that such a share is worth only one aliquot part of whatever property the corporation may own and naturally suggests the necessity of learning just what that property is worth.

8. Another very decided advantage in its use is that it enables a corporation to change the selling price of its stock either upward or downward as its property or earnings may increase or decrease. Take for example, a corporation organized with $25,000 of stock divided into shares with a par value of $100.00 each, and which corporation after the end of one year finds itself with its net assets worth only $15,000. It desires that its net worth be brought back to $25,000.00, but who would be likely to buy any of an additional issue of stock at $100.00 per share when its old stock was worth only $60.00.

9. That takes the matter of no par preferred stock. A concern large enough to make a general offering of stock to the public, and which might want to offer stock on different occasions, would be controlled in its ability to sell at any given time largely by the going rate of money in the open market, and while at one time it was possible to sell stock bearing 6 per cent dividends at $100.00, it might not be possible at the time it sold its next block of stock, and it might have to sell 6 per cent stock at $95.00 per share, which it could not do if the stock had a par value. If either of the concerns in the instances I have cited sold their par value stock at less than par the purchaser would be liable to creditors in event of failure of the concern for the difference between what he had paid and $100.00 per share. I remember a case before such stock, etc.

10. There are many other considerations in favor of no par stock, such as the case of a group of people who would be willing to put up the money for the formation of a corporation and, after receiving a fair return on their money, to divide a certain amount of the profits with some man whom they had selected as manager. This could easily be done by issuing preferred stock for almost all the money put up, and non-par common stock at a nominal price, selling to, or setting aside for, such manager, such proportion thereof as he was to receive of the net profits.

11. There is one decided difference between Mississippi Corporations and those organized in Delaware and a good many of the other states, and that is that under the laws of many of the states certain classes of stock can be deprived of all voting power, except regarding those matters relating purely to that class of stock or

one senior thereto. Under Section 194 of the Mississippi Constitution it is provided that every share of stock shall be allowed to vote for directors or managers. This is, of course, respected in the new Act, though as to other matters, which could not possibly concern certain classes of stockholders, their voting power may now be eliminated.

12. Express provision is also made for the fixing of a call price for retirement of preferred stock, with a further provision that no such stock shall be retired if the corporation would thereby be rendered insolvent or its paid in capital reduced to less than the minimum amount required by its Charter. This stating in the Charter the number of shares necessary to be subscribed and paid for being a provision to take the place of Section 4560 of Hemingway's Code of 1927 requiring 25 per cent of the authorized stock to be paid in before the corporation could begin business.

13. Another very important provision in the new Act is that it does away with the necessity for publication of a Charter before it shall be granted, and in lieu thereof there is a provision that it must be published one time within thirty days after it shall have been granted. Frequently when it is decided to organize a corporation the people who are organizing it wish to get it in operation at once, but under the old law they could not do so for about a month, and then if it did not meet the approval of the Attorney General or the Governor it would have to delay while its Charter was again being published. Remember the Mississippi Rehabilitation Corporation, which had to go to Delaware for its Charter, in order to get quick action. There were certain charters under the old law, of course, that were not required to be published and the provisions with reference to them remain the same. It is also provided that existing corporations may amend their charters so as to come under the new Act.

14. A provision which was attached to the bill as an amendment in the Senate, provides that every foreign corporation doing business in the State of Mississippi must on or before June 1, 1928, file a written power of attorney designating the Secretary of State, or in lieu thereof by resolution designate another individual or corporation, as its agent upon which service of process may be had, and file such power of attorney or designation of an agent with the Secretary of State. The penalty for failure to do so is that such corporation shall not be permitted to bring or maintain any action in any of the courts of the State. This is rather drastic penalty, especially since the time allowed for it is very short but I understand that all foreign corporations are being notified of this provision and given an opportunity to comply therewith.

15. Most of the states have, for sometime past, been deriving revenue from corporations annually in the form of an excise tax but Mississippi has never done so. However, the new Act contains a provision for the making of annual reports of a certain nature to the Secretary of State, for which the State receives a flat sum of $10.00 for the filing of each of such reports. They

must be filed by June 30th each year. Besides giving the State a substantial revenue, which is not burdensome to any one corporation, this will have the effect of clearing up the records in the office of the Secretary of State. Those of you who have had occasion to search for charters in that office know what a job it has been to find one when you were not sure of the date of its organization and even when you did find it there was no way of telling who the officers were at the time or, in fact, whether the corporation was still in existence. Some corporation might have been formed 30 years ago and have functioned for only one year but there would be nothing to indicate that it had ceased to do business and the name which it used could not be used again because that name was still being carried as the name of an existing corporation. Or suppose you wanted to sue some corporation who had no active place of business, how would it be possible to determine who the officers were? The present system of annual reports will serve to provide all necessary information as to the officers, directors, domicile and principal office, the character of its business, both its authorized and outstanding capital stock and if it has business outside of the State, then the name and address of its resident agent in this State.

16. Another Code section that was repealed was No. 4511 of the Code of 1927, which sought to make directors of corporations liable for debts in excess of their capital stock under certain circumstances. That was a section which was pretty generally ignored and hard to enforce and with no par stock it would have a very ambiguous meaning.

17. The new Act is not perfect by any means, and it will be necessary for other amendments to be added from time to time but it is a great improvement over the method existing heretofore, as that method was an improvement over the old method of having charters issued only by the Legislature which was necessary in most cases up to about forty years ago.

18. Two matters which, in my opinion, should be handled by the next Legislature are, first, clarifying the laws with reference to domesticating foreign corporations and, second, simplifying the method by which a foreign corporation once qualified to do business in the State may withdraw therefrom.

19. But this and other matters will suggest themselves to all of you from time to time since so much more business is now being done in corporate form than ever was done before and the formation of corporations will probably continue to grow as more and more people begin to realize the advantages in that method of business operations.

PRESIDENT WILBOURN: The Association has received greetings from three former Presidents of the Association, who were unable to be present at this meeting, and I will ask Hon. A. T. Stovall to come forward and read those messages to the Association.

MR. A. T. STOVALL: Mr. President, and Gentlemen of the Association: I will read the telegram from Battle Creek, Michigan:

R. E. Wilbourn,
President Mississippi State Bar Association,
Gulfport, Mississippi.

I regret exceedingly my inability to attend the meeting of our Bar Association this year (Stop) This Association has been a great constructive force in the State and I trust that it may be increasingly so in the years to come (Stop) Please express my love and appreciation to the membership all of whom I remember with great pleasure.

J. S. SEXTON.

Vicksburg, Miss., May 2, 1928.

R. E. Wilbourn,
President State Bar Association, Care Markham Hotel,
Gulfport, Mississippi.

Regret my inability to attend. Sincere wishes for a successful and enjoyable meeting. Please read to convention.

A. A. ARMISTEAD.

Canton, Miss., May 2, 1928.

R. E. Wilbourn,
President Mississippi State Bar Association,
Gulfport, Mississippi.

Regret business keeps me here. Have attended all meetings but two since organization. Wish you pleasant and profitable Association. Give my love to all the boys and girls.

W. H. POWELL.

Now, Mr. President, and Gentlemen, I move that acknowledgment be made by the Secretary to these respective Ex-Presidents, and that the telegrams be incorporated in the minutes of the meeting.

MR. DULANEY: I second the motion.

PRESIDENT WILBOURN: You have heard the motion, duly seconded. All in favor of that motion will say AYE; opposed NO. The motion is carried, and the Secretary will send the telegrams.

I notice we have with us a good many of our ex-Presidents of the Association; and I want all of them to rise and let us give them a greeting. Stand up, all of you ex-

Presidents that are here. (All ex-President stood up during applause.)

That shows they are grateful for what we did for them, and they are still with us in heart and purpose.

We come to the matter of the reports of the committees. Published in the minutes of the last meeting you will find a list of these committees for the years 1927-28. I believe I will call the roll of those committees as they appear in the minutes of the last preceding meeting. The first is the Committee on Jurisprudence and Law Reform. The Chairman of that Committee is Hon. V. A. Griffith, who has been recently appointed on the Code Commission.

JUDGE V. A. GRIFFITH: Mr. President, and Gentlemen of the Bar Association: We have had to hastily reconstruct our report. We had intended, along the same lines, to place before the Bar Association a report covering a recommendation that the legislature proceed to have a new and revised code, and that this be followed with a continuous commission on law revision. At the time we had decided on that kind of report we had no idea that the legislature would ever resurrect the bill that had been introduced for a revised code at this time. We had been almost certain that the bill providing for the code revision would not pass. But very much to the surprise of everybody, I believe along about midnight of last Thursday, they got that out of the pigeon-hole and it was passed; and I suppose none of the lawyers really knew about that until they saw in the public press that the members of the code commission had been appointed. I, for myself, did not know it had become a law until I received a telephone message from the Governor's office that I had been appointed on the Commission, and asking if I would accept. So, we have had to re-draft our report and change it according to the changed conditions.

And in further connection with this matter of a revised code, as well as by way of introduction to our present report, I would like to add that I have endeavored to get the members of the Code Commission here today, and not later than tomorrow, so as to lay before this Bar Association some of the matters on which we want to get help from this Association; but it will be tomorrow before we can get at least one other member of this Commission here; so, what I will say will not be speaking for the Commission at all, but will be my own individual ideas.

We have had no revised code since 1906. As a matter

of fact, the Code of 1906 was not a revised code; it was simply a compilation; for many, if not most, of the recommendations of the Commission of 1906 looking to any revision were rejected. It was not permitted that any member of the Code Commission should appear, and no one of them did appear, before any committee of the legislature. The work was taken up in their absence, and the changes and revisions made by that Commission were not explained or understood, and were generally rejected. We have, therefore, not had any generally revised code since the Code of 1892, and the manner in which that was accomplished was that Senator Dillon, a very learned man, who was a member of that commission, was a senator and could explain and defend in the Senate all of the revisions made by that Commission; and it was provided by a resolution of the House of Representatives that Commissioner Thompson should be invited to attend all of the hearings on that Code in the House of Representatives; so, the members of the legislature were enabled to have a complete understanding of what was done in the way of revising the Code of 1892; and that was a general revision. Since that time, as I have said, we have had no actually revised code. There have been compilations. Since the Code of 1906, we have gone along with private codes provided by Hon. William Hemingway. They were compilations; he had no authority to revise anything; and he did well, encumbered, as he was, in this respect. The result has therefore been inevitable that the last two volume compilation put out, called "Hemingway's Code of 1927", consist largely of a cumbersome series of statutes added upon top of statutes, and with an index only in the last volume, so that it is almost impossible to use it expeditiously in court work—this was really the reason why the legislature finally passed this code revision act. You see, therefore, we have had no actually revised code since 1892, and by 1930 that will be nearly forty years, since which statutes have been built on top of each other, and while we will have this Hemingway's Code as a considerable help, it is apparent if this Commission is to submit a really revised code to the legislature of 1930, the time allowed being so short, it is obliged to get aid from the members of the Bar of this State.

I might take, as an illustration, the drainage laws. We have no contests over drainage throughout this part of the State. We have one district here in this County, but we have had no litigation over it. But I understand that in

some sections of the State the chancery courts are filled with controversies over the drainage laws. Lawyers tell me that if there was ever confusion confounded it is the drainage laws of Mississippi today.

As another illustration, we might select the road laws. What lawyer in Mississippi can today tell what the road law is? It is a piece of patch word, the whole thing. Take Hemingway's Code—he has done the best he could without authority—it is like a man whose house has got too small for his family, and instead of rebuilding, it he has built rooms all around it without doors leading from one room to another.

Now, that is the situation respecting a great portion of the law of Mississippi today. My own ideas are that a revised code, if the Commission can be properly advised and have the proper backing, can be made to consist of a code of only sixty per cent of the matter in the present compilations; that the purpose of this Commission should be to eliminate useless statutes, and all duplications, and abridge most of the remainder by intelligent consolidations.

Take the action of ejectment. It fills twenty pages in our present compiled code, when taken together with the annotations. In this County, I think it has been fifteen years, as far as I have any knowledge, since an action of ejectment has been tried in the circuit court. The action of ejectment was a good action at one time. At one time in a great many portions of the State when a suit in chancery was filed to try title to land it was doubtful if the complainant's heirs would live to see the termination of the suit; so, the action of ejectment was serviceable at that time. But under our reformed and modified chancery practice, which has been brought up to date and made the equivalent of any state, even New Jersey, you can get a suit determined in the chancery court of Mississippi today, if either of the parties desires to do so, as soon as you can in the circuit court.

Therefore, as to the chapter on ejectment, which covers twenty pages, my idea is to dispose of it in about four lines, as follows: "That the action of ejectment, as heretofore known and practiced in the courts of law in this State, is abolished, and all causes and actions which heretofore could or should have been brought in ejectment shall be brought in the chancery court by bill to cancel clouds, or by some other suitable bill in that court."

It is the most inappropriate thing in the world in a

complicated ejectment suit to see a jury of twelve men, mostly farmers, befuddled with a pile of land deed records this high, all to be read to them, with a lot of instructions that they cannot understand. We had as well flip coins for the verdict.

Take as another illustration the chapters on executors and administrators, and guardian and ward, and on wills and testaments: there are forty duplicate sections in those chapters. These ought to be consolidated and brought in one chapter called Probates, or something of that kind.

That is my idea of what the revised code should be; not so much revised, but trimmed down. There has been section upon section added, so that we now have two great big volumes of the Code there, and I believe it can all be put in one volume, and if not in one volume, then such chapters as deal with the insane asylum or penitentiary, and those merely political matters, can be put in one smaller additional volume.

It has, therefore, occurred to me that this Commission is bound to have considerable help from the Bar of the State. I do not know a thing about drainage laws—not a thing in the world. I am satisfied Judge Stevens does not; and if Judge Crum does not, there will be a Commission that does not know anything about that particular subject.

Now, there are the school laws. They had a commission of school men to codify the school laws. And what was the result? They had better kept the old ones, for certainly no one knows now what the school laws are. I know, for I have presided in many litigated cases on the subject, and when you get litigation in the courts over school questions, and John Jones and his folks line up on one side, and Bill Smith and his folks on the other side, and the whole community lines up, part on one side for the complainants, and part on the other side for the defendants, you can figure it is going to be a big job for the sheriff to keep peace, and since you cannot tell what the law is, there is trouble in the land. It is true that I taught school a long time ago, but it was under pioneer conditions. I do not know what exactly ought to be done as to the school laws, and I simply suggest to this Bar Association here that the Commission will need help on that subject. And, as I have already mentioned, there are the road laws. Who can tell out of the different and conflicting statutory plans for road work, what the law really is on the subject? I wish we could arrange some method by which this Commission

could receive practical and speedy help from the Bar of this State. I know of no way to get that, unless we borrow from the banks—I mean borrow plans of procedure from the banks. You know how they do it? They have group meetings. They would have a meeting here, and over here, and all over the country. These group meetings get things together, get their plans made, so when they come to the general banker's meeting they have everything planned out, and can have them before the general meeting in a matured way. I think it would be a valuable thing, and worth the time of the lawyers of the State if this Association would agree on some plan of group meetings, or group associations of the lawyers of the State on this very question of the revision of the Code, and that these meetings should map out and point out what they think on these important subjects, and others, so as to advise this Commission not later than the first of January. Group meetings would get an attendance, whereas, when you have some central meeting it is too expensive and you have too much time away from home. But whether that would be a practical plan, I submit to this Bar Association. I am certain the Code Commission would ratify what I have said, if some plan could be worked out for the assistance of the Commission in this great work.

To conclude, I repeat, with all due respect to the Commission of 1906, and since they were not allowed to do that work as they wanted to do it, we have had no real Code since 1892, and that is nearly forty years—we have had no generally revised code. We ought to have one now. As for myself, I am going to burn a considerable amount of midnight oil in an honest attempt to do that thing; but it is a stupendous task for three men alone and without aid to do it. With those remarks, I will submit our report.

REPORT OF COMMITTEE OF JURISPRUDENCE AND LAW REFORM

To the President and Members of the State Bar Association:

During the 1928 session of the Mississippi Legislature two bills were introduced in the House of Representatives looking towards the improvement of our general statutes.

One of these was House Bill No. 16 entitled, "An Act to Provide for the Codification and Annotation of all the General Statutes of the State of Mississippi, and the Annotation of the Constitution of the State and amendments thereto"

It was passed by both houses and approved and the Commissioners provided for have been appointed. In the main it is similar to the laws under which our earlier Codes were compiled. The proposed new Code is to be in two volumes, the first of which shall contain laws of a criminal and civil nature most frequently used at the bar. The work of the Commissioners is

to be completed and copies of the proposed Code delivered to members of the Legislature thirty days before the convening of the 1930 session. Leaving out of view the very useful and excellent compilations made by Honorable William Hemingway there will have elapsed a period of twenty-four years since the adoption of the last Code and we feel sure that the work of the Commissioners will be awaited with much interest.

The other bill referred to was House Bill No. 1101 entitled, "An Act creating a Commission on Law Revision; providing the number and method of selecting commissioners and filling vacancies in the commission; the qualifications, terms of office, duties and compensation of commissioners; and making it unlawful to seek such office or vote for any person who does so". This bill was introduced rather late in the session and although reported favorably by the House Judiciary Committee en banc it was never called up for passage. The bill was referred to in the press as having perhaps the most far reaching possibilities of any introduced during the session and the proposal embodied in it for a continuous, systematic effort towards the improvement of the statutes appeals to your Committee as being so important and has met with the approval of the bench and bar to such an extent that we feel justified in including the full text of the bill in this report for the consideration of members of the Association. Omitting the title just quoted it is as follows:

"SECTION 1. BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MISSISSIPPI, That for the purpose of attaining for the people of Mississippi and all affected by her laws a revised system of general statutes as clear, precise and free from doubt, ambiquities and conflicts as may be possible, there is hereby created a commission to be known as the Commission on Law Revision of the State of Mississippi, which shall be composed of three members or Commissioners, one of whom shall be selected and commissioned for and from each Supreme Court District of the State. The qualifications of such commissioners shall be the same as are required of judges of the Supreme Court. The term of office of each commissioner shall be for four years and until his successor is commissioned and qualified by filing with the Secretary of State the oath required by law.

"SECTION 2. On the first Thursday in April in the year 1928, and every fourth year thereafter, the Governor, the Attorney General, the Judges of the Supreme Court, the Chairman of the Judiciary Committee of the Senate and the Chairman of the Judiciary Committee of the House of Representatives shall meet at the office of the Governor for the purpose of electing such Commissioners. If for any reason commissioners be not elected on the day named or in the event of a vacancy in the office of the commisssioner such officers shall meet for the purpose of filling such vacancy or electing commissioners as soon as practicable thereafter on a date to be fixed by the Governor, who shall give such other officers at least five days notice thereof. Those present may proceed to elect commissioners in the absence of one or more of such officers but the votes of four such officers present shall be required for the election of a commissioner. A judge of the Supreme Court shall have a vote in the selection of no commissioner except the one for the district represented by such judge. The names of the commissioners selected shall be certified to the Secretary of State and commissions shall be issued to them as to other officers. The terms of office of such commissioners shall begin on the first day of June after their election, but any elected to fill a vacancy shall hold office for the unexpired term.

"SECTION 3. It shall be unlawful for any person to directly or indirectly solicit his own election to the office of commissioner or the vote or influence of any person for that purpose. It shall further be unlawful for any officer named in Section Two of this Act to knowingly vote for any person as commissioner who has solicited such vote of such officer.

"SECTION 4. It shall be the duty of such commissioners: to elect one of their number to serve as chairman and preside over their meetings; to adopt such rules, not inconsistent with this Act, as they may deem proper with reference to their meetings and the performance of their duties, and to change the same from time to time; to hold at the State capitol at least two

meetings annually, which shall be open to the public; to make a careful study of all general statutes of the State and opinions of the Supreme Court of Mississippi; to prepare and deliver to the Secretary of State at least sixty days before the convening of each regular session of the Legislature a biennial report to the Governor and Legislature, calling to their attention such general statutes as in the opinion of the Commission, may be conflicting, of doubtful meaning, unconstitutional, obsolete, or have a tendency to unduly complicate the administration of justice or work a hardship or for any other reason require revision; also in such report to set forth such additional propositions not embraced in the general statutes and not definitely settled by decisions of the Supreme Court as in the opinion of the Commission may require legislation in the interest of certainty in the law; also in such report to submit drafts of such amendments, revisions, and acts as the Commission may recommend for enactment together with the reasons of the Commission for recommending each, and also drafts and revisions of such acts as may be referred to the Commission by either house of the Legislature for that purpose.

"It shall be the duty of the Secretary of State to cause such report to be printed and published as reports of state officers and institutions are printed and published and to mail a copy thereof to each member of the Legislature at least thirty days before it convenes in regular session and also upon request to mail a copy to any officer of the State or subdivision thereof, or person admitted to practice law in the Courts of Misssissippi.

"It shall be the duty of each judge, chancellor, state and county officer to co-operate with the Commission in its work by calling to its attention general statutes which require revision.

"SECTION 5. Each of the commissioners shall receive as compensation for his services a salary of three thousand dollars per annum, payable as salaries of State officers are paid. All necessary traveling expenses of the commissioners, postage, stationery, stenographic, and other necessary expenses incident to their work shall be paid on vouchers signed by the commissioners.

"SECTION 6. That this act take effect and be in force from and after its passage."

It has been urged by the advocates of this measure that the general statutes which affect the administration of justice, the conduct of the public business and the lives, liberties, property rights, and business relations of the citizens should be as free from ambiguity and conflict as human wisdom can make them. They point out that the problem of defective enactments is a continuing one and that without any hope of attaining perfection it is inexcusable that we do not seek to approach it in a matter of such importance. The increasing burden of statutory construction is evident in every volume of Mississippi Reports and the number of dissenting opinions indicates the difficulties of the Court. The lawyer in the practice perhaps feels this burden and realizes these difficulties to as great extent as do our judges. It was urged that although our Code Commissions of the past had been composed of men of great legal ability and learning a great many defective statutes have been carried forward from one Code to another, continuing their mission of confusing the advocate, perplexing the Court and outraging losing litigants who must always number fifty per cent. It is also shown that however able and learned our Code Commissioners might be in the future this would continue to be true because the compensation of such Commissioners is not sufficient to enable the judge to surrender his office or the lawyer to give up his practice and devote his entire time to the matter, and even if this could be done the period of two years usually allowed would be too short for a word by word and phrase by phrase analysis of each statute together with the decisions construing it and the further consideration of each as a part of the whole body of statutory law. It was further pointed out that if we were to assume that a Code approximating perfection could be submitted by the Code Commission there would be within the succeeding four, eight or twelve years another considerable body of statutes enacted which might conceivably be defective either in themselves or as parts of the whole. Without criticising either the work of the Code Commission or of the Legislature it is said that there is a need for something more than the careful enactment of statutes and

their periodical codification and that the problem can only be solved by intensive study and scientific effort somewhat similar to the work the American Law Institute is attempting for the common law.

With this reasoning and conclusion your Committee concur and make the following recommendations:

1. The approval by this Association of the principle of a continuous and systematic revision of the general statutes.

2. The appointment of a Committee to be composed of two members from each Congressional District to co-operate with the Committee on Jurisprudence in studying the problem and creating interest on the part of members of the Bar.

3. Authorizing this joint committee to prepare, print and distribute to members of the Bar and of the Legislature a report setting forth the problem, a copy of the bill (with such changes as they may recommend) together with perhaps some of the expressions from members of the bench and bar and any other matter the committee may see fit.

Respectfully submitted.

Before moving the adoption of the report, let me add that it to some extent follows the recommendations made by the Hon. T. C. Kimbrough, Dean of Our Law School, in his address before the Institute of Mississippi Affairs last November. A great many of his ideas then expressed are incorporated in the report, and those who have not read his address on that occasion ought to procure a copy and read it, because it is an address of great interest, and ought to be to every lawyer in Mississippi, and to every thoughtful citizen of the State.

We are indebted to Mr. J. W. Dulaney, of the Tunica County Bar, for aid in this matter, and for really preparing this report. He has followed up this subject—has gone before the legislature and given his time to it; he has made a complete study of this matter, and has got it in such shape the Committee could use it. In addition to my suggestion that we would like to have the thought of this Bar Association on this problem of the Code Commission, it would be pleasing if, upon the motion to adopt this report, we could hear from Dean Kimbrough and Mr. Dulaney on the subject of this report. I move its adoption.

JUDGE SYDNEY SMITH: I second the motion.

PRESIDENT WILBOURN: You have heard the report, so ably presented by the Chairman, and the motion for its adoption, duly seconded. The matter is before you and open for discussion. Is there any discussion of the report? It is suggested that we might hear from Judge Kimbrough and Mr. Dulaney. What is your pleasure?

MR. J. W. DULANEY: Mr. President, and Gentlemen of the Bar Association: I was very much impressed with all of the able address of our President this morning; particularly impressed at the moment with his quotation from

Mr. Mencken criticising the Bar. Mr. Mencken is not the only gentleman who has seen fit to criticise it. It seems we go around in an almost endless circle—the layman criticises the law, the lawyers criticise the courts, the courts criticise the legislature, and so we keep on. I suppose if we could hope for nothing better from our Code Commission, that at least two years from now we could look for a little rest, and lawyers, legislators, and judges could join in criticising the Code Commission. I hope for a great deal from the new code. We have had appointed three exceptionally able Code Commissioners; we have a right to expect a great deal from these men, and I feel sure we will not be disappointed. Within the limit of time at their disposal, I feel sure that all will be done that can be done towards the perfection of our statutes. But they deserve our sympathy. They are vested with a tremendous task. They have the accumlations of forty years to try to straighten out. I doubt whether they will even make an effort to perfect for us a body of revised statutes. They may revise one here and there; but the task is too tremendous for us to expect anything like the Code to which we are entitled. Thirty-three years ago, about that length of time, Judge Whitfield in discussing the two donee statute said that the author had no conception in his own mind what common law rules he was displacing; yet, as a code commissioner, and an excellent one, a few years later he and the other able commissioner carried forward the two donee statutes in the Code of 1906. I doubt if our Code Commissioners will in the time at their disposal attempt such a problem as that statute presents. It has been construed by the Supreme Court thirty-three times, and yet there are a great many open questions under it today.

It is needless to point out the defective statutes to a body of lawyers. I might name some 5 or 10 that have come under my individual experience; but each one present could name five or ten illustrations of the problems before us that would mean just as much. We have had men come into our office day after day asking as to their rights under the particular law, and those of us that have gotten old enough tell them without shame that we cannot tell them what the law is. We say, if it is worth enough to you, and you can take the time, we will carry the case to the Supreme Court for you and find out what it means.

I call attention to this language in this report just read: That it is inexcusable that the statutory law which governs

the rights and liberties of the citizen, governs his business relations, should be any less perfect than human wisdom can make it; and that it is less perfect all of us realize today. While statutes are incomplete, they cover what may happen in nine cases. Some of them are of very doubtful constitutionally. My attention was called to one this morning that, perhaps, with slight change the intent of the legislature could be carried out and yet the matter brought within the constitution. Some of them, as Judge Griffith has pointed out, have not been used for years, and are just encumbering the books.

Now, we have our boards that are studying methods of eradicating the cattle tick; we have our experiment stations that are trying to improve cotton seed; there is systematic continuous scientific effort being carried on in nearly every other profession; yet, we as lawyers are making very little effort to cure the defects in the law that we practice, the statutes that we must construe, and have construed; and there is not the scientific progress in our profession that there is in many others. Cocain has been changed to novocain, and perhaps novocain to some other better local anaesthetic. The medical profession is making strides by careful study and scientific effort. Now, lawsuits are not going to run out; we are not going to get rid of all the defects in the statutes. There will always be enough room for construction. But the patent errors of statutes, the statutes that right on their face are awkward and cumbersome, something should be done to cure matters of that kind, and the only way it will ever be done is by the same method that other professions are using, a careful, systematic, continuous scientific effort. This bill was suggested by the work of the American Law Institute, the great work they are carrying on. Those of you who have not gotten the pamphlets, I would advise you to do so. If you can get your case covered by one of their statements, and it agrees with your contention, you have almost got your case won, because you have found a clear concise statement of the common law rule, a statement that was put there after, as this report shows, word by word and phrase by phrase consideration. But assuming we perfect a statement of the general body of the common law, still the administration of justice is greatly hampered until the general statutes are in better shape. I suppose nine lawyers out of ten, we don't go to the reports; we don't go to the decisions of other states, or to the common law; we pull

down the code and see what the statute is; it is only in ten per cent of the cases that come in the average law practice where we have to go out and hunt up the principles of the common law. So, I believe work along this line on our statutes means more, perhaps, to Mississippi than the perfection of the work of the American Law Institute.

There is not much I can add to what Judge Griffith has said—what he has delivered in his report. The burden that is upon these Code Commissioners is fully realized by them; and we need an effort along the line mentioned in this bill.

Now, I have a firm conviction that whenever the Bar of this State wants the statutes corrected, it will be done. I found it was as easy to explain this proposition to a justice of the peace, or a man who had never been in the court, as it was to discuss it with Judge Smith. The layman knows we have defective statutes; he knows there is uncertainty in the law.

Now, my idea is that perhaps the appointment of these Code Commissioners is a great step toward this end. Perhaps it would be better to start off on a scientific revision, with a fresh new code, because there is so much can be chopped out and remedied before we start the detailed analysis of the statutes. It will be two years before we will have another regular session of the legislature. The report proposes, and I wish to heartily recommend to the members of the Association this program, that we appoint this Committee of two members from each congressional district to co-operate; that the matter be given publicity, not merely among those members of the Bar who attend our Association, for unfortunately it is a small per cent, but to every member of the Bar, and that we meet back somewhere next year with the matter put in pamphlet form, and have every lawyer in Mississippi fight out the problem brought under his notice, as well as the suggested remedy. Then we can take up the matter of local influence and bring it to the attention of our county and district representatives, and in all probability go to the Legislature in 1930, with the adoption of the new code, procure the adoption of this measure, or one similar to it, which shall insure the continuous work of clarifying our statutes. I assume Judge Griffith would admit this, or any code commissioner would—that he might write out a statute today and do his very best on it, and two or three years from now see where it was defective in some particular, where a little

different language would have made it more complete. This would be true of any code commissioner; and I believe with this Association behind the move at this time to awaken the members of the Bar, and at our next meeting to try to awaken the interest of the public to the problem and the magnitude of it, the thing can be accomplished. I thank you.

PRESIDENT WILBOURN: We would like to hear from Judge Kimbrough.

JUDGE T. C. KIMBROUGH: Mr. President, and Gentlemen of the Association: I think we are to be congratulated that there have been appointed for the code revision men who are so capable of doing this work; men who have had some training; men who will go to this task with the idea of doing something constructive, something that will be of benefit to the Bar and to the State.

I think one of our troubles as a bar of lawyers in this State, outside of our work as lawyers in the courts, is we do not take ourselves seriously enough. You take this body, for instance, we come here meeting, and the thing uppermost in our minds is to have a good time; we do not come here with any idea of doing anything constructive in the way of work wanted to strengthen our laws of today that will be beneficial to the legal profession; we come here to do as little work as we can, and have a good time. That is my observation. Maybe it is because I have been doing that way, I don't know; but I have that impression about it. I think it would be better for us, and we would accomplish more, if we would take our work more seriously.

I want to thank Judge Griffith for his kindly reference to the paper which I prepared and read before a meeting of the Association at the University dealing with the practice in this State and the work of our courts, trying to make some suggestion about what might be done in order that the courts might handle their business more efficiently and more expeditiously. In this paper I suggested that I believed it would be a wise thing for the legislature to appoint a judiciary commission who should be charged with the duties of continuously studying these questions and making suggestions as to how the work of our courts might be speeded up.

Now, as I see it, the trouble we have is this: You take in a large measure there has been little constructive work done in many years in trying to frame statutes so that the work of the courts might be more easily done and more ex-

peditiously done; nobody has ever given any thought to it; just here and there a man would give some thought to it. What is the result of it? You can take our statutes, and you will find a statute enacted seventy-five years ago dealing with the process in the courts, you will find a patchwork condition running all the way through it. There is no systematic hard thought out scheme to be found in the code. I do not think that ought to be—men belonging to a profession that is said to be one of the soundest, most scientific, learned professions—it ought not to be. I find in something like ten or twelve states this judicial council has been brought into existence by act of the legislature, and men learned in the profession, men peculiarly fitted by temperament and learning to give their time and attention to these things, are appointed on these commissions, and they study the work of the courts; they take into consideration all of the statutes dealing with the work of the courts, and they seek to bring about a condition where the business of the courts may be handled more expeditiously, with more satisfaction to the public, and with less cost to the state. You know, and I know, about that. It is depressing at times, the way in which lawyers rock along in the courts, the people are worn out in trying to get satisfaction out of the trial of their case in the courts. It ought not to be so. If we are a learned profession, if the law is a science, then let us get out of the way this underbrush in the code, so the courts may do their work properly.

Now, I think this same learning that is being put into effect in other states through commissions, we ought to have it here.

As Judge Griffith has pointed out, you have our road law, you have our school law, and there isn't a lawyer within the confines of this state who can tell you anything about what the road law of the state is, what the school law is; it is confusion worse confounded; it is a lot of patch work, and a disgrace to the lawyers of the State of Mississippi. We had as well be frank about it. Who is to blame about it? The lawyers of the bar, our native men, go down to the legislature, some man will offer an act and it is passed without any study whatever on the part of anybody who has looked into the matter as a whole, and who has some scheme or system in his mind which will give us a perfect plan or scheme for doing the thing we want to do. That is the trouble about it. It is a sort of patch work

thing. A man goes to the legislature, he offers a bill, not one-tenth of the men in the legislature ever think one thing about it—this man is a good fellow, we will pass his bill for him; they do not know what effect it will have on the law, and they will wait and see what the Supreme Court says about it when it goes up there. So, the result is, instead of having a scientific sort of thing, we have a crazy patch work sort of thing that is not worthy of the lawyers of this State; and I think it is time we are beginning to take these things seriously and study them out in a proper way, and appoint commissions of thoughtful, careful, painstaking men, who will work out these matters like business men work out their matters.

You take the banks of this State, if they did business like we as lawyers do when it comes to making a code, or something of that kind, they would have every bank in this State "busted" in just a short time.

I heartily commend the idea that has been suggested here. I think a great work can be done by this Code Commission that has been appointed, and I think every member of the Bar of this State in a sympathetic manner ought to approach the questions that are going to be involved here and do everything they can to assist the Code Commission in bringing into existence a good code. It will well repay us if we do it.

PRESIDENT WILBOURN: I am sure we all appreciate the splendid remarks of Mr. Dulaney and Judge Kimbrough in connection with the matter before us. Is there any further discussion of it?

MR. W. A. ELLIS: I want to say a word. I have often attended the Bar Association. This is about the first question they ever had up for discussion that I understood. I believe I understand this very well. I touched Judge Heidelberg and said: "Did you hear that criticism of the legislature." I was there in 1904, and helped make this Code, and I saw there were some things had gone wrong, and I want to say here I thought the legislature did wrong then; it is a fact the legislature refused to let the Code Commissioners explain anything; I did not think it was right then from the very inherent nature of the thing. You take the legislature, it is made up of lawyers, blacksmiths, store dealers, and it is a conglomerate mass. We have great men in the legislature, proven men, but they let their interest go elsewhere, and neglect their official duties. When the press meets, we have experts on the newspaper;

when the drummers have their session, we understand what the traveling men have; but when the legislature meets, God only knows what we have got—we have a conglomerate heterogeneous mass. It is our system of government, and we cannot avoid it. I am in favor of the resolution before the body suggested by Judge Griffith. I think he is a great man. I am heartily in favor of the resolution, and let us keep it up and keep it going from year to year, and let us help the legislature, that we may know the laws, and having known them obey them.

PRESIDENT WILBOURN: Is there any further discussion? Are we ready for the question? All in favor of the adoption of the report of the Committee on Jurisprudence and Law Reform let it be known by saying AYE; all opposed NO. The motion is carried and the report is adopted.

JUDGE D. M. RUSSELL: Mr. President: Before taking up another matter, I think I heard in that report and in Judge Griffith's statement an appeal to this Bar Association to which I think we ought to respond. There was an appeal in there that this Bar Association render the Code Commission a real service in their undertaking; that appeal is that we furnish them expert advice on these various subjects with which they will have to deal. I believe, therefore, that this Association owes that Commission the appointment of suitable committees, to be named by the President, who will prepare reports to be submitted to them from time to time upon their information and request in order to collaborate and render them a real service in working out their report of these various subjects. I am going to venture the motion that the President of this Association be authorized to appoint a suitable number of committees, and a suitable number of committeemen on them, to prepare a report on such subjects as the President may indicate and submit them to the Code Commission upon their invitation, and from time to time.

MR. GEORGE BUTLER: It is your thought to have two from each congressional district, as suggested in this report.

JUDGE D. M. RUSSELL: The motion provided that the number be left to the President.

MR. GEORGE BUTLER: I understand Judge Griffith's suggestion was that we have two from each congressional district.

JUDGE V. A. GRIFFITH: I simply read the bill that

was introduced at the last session of the legislature. What I was trying to get at was to devise some means of assistance to this Code Commission. I make no specification as to how you do it. But I might say, I am not authorized to do anything for the Commission. We have not met. They may be here tomorrow, and I might suggest that we postpone this until tomorrow and allow the Bar to think over this question and devise some practical means instead of acting on it hastily.

MR. J. W. DULANEY: There is a little confusion on the two propositions. I think the report embodied three suggestions to the Association, which I understand have been adopted; one was that the Association commits itself to the principle of a continuous scientific revision of the statutes; next, that the Association appoint a committee of two from each congressional district to assist in re-drafting this bill, if necessary, and in promoting the move for this kind of revision, and that action, I understand, has already been taken. But Judge Griffith has appealed to us for our co-operation in regard to the new code, which is not necessarily a part of this other. They will work together nicely, but they are not the same plan exactly. I would make this motion, in response to his invitation: That the President appoint a committee of three to confer with Judge Griffith and the other Code Commissioners, if they arrive tomorrow, and report to the Association tomorrow their recommendations as to how we can help the Code Commissioners.

MR. GEORGE BUTLER: I second that motion.

JUDGE D. M. RUSSELL: I would like to withdraw my motion.

PRESIDENT WILBOURN: There was not a second anyway.

MR. JOHN A. YEAGER: Mr. President: My remarks may not be exactly in point on the subject-matter presented by the motion. However, if I may be permitted to do so, I wish to say that, in my humble judgment, it would be the part of wisdom to have an advisory council, or a commission **amicus curae**, to advise with the Code Commissioners, at any time that the Code Commissioners might wish to invite that **amicus curae** commission to sit with them for discussion, or to submit written suggestions to them upon certain subject-matters during the process of codification.

Now, I was very much impressed with the proposition presented by Judge Griffith with reference to the proposed law which was not passed by the last session of the legis-

lature, consisting of ten members, I believe. The bill died on the calendar. It came to the floor on favorable report. I noticed that Judge Griffith discussed it at some length in his report, and I was very much interested in that.

PRESIDENT WILBOURN: Pardon me, but that report has been adopted, and the Association has committed itself to the principles involved in that bill. The matter before the Association now is the motion to appoint a committee to confer with Judge Griffith and the other members of the Code Commission with a view to working out some plan to be suggested by them with a view to aiding the Code Commission.

MR. JOHN A. YEAGER: I understand, Mr. President, and I knew I was slightly deviating from the subject-matter; but you must remember that I have been fighting for the past four months without a single agreement upon any one given subject-matter, and I was leaving the subject in order to try to start something.

PRESIDENT WILBOURN: All right; go ahead.

MR. JOHN A. YEAGER: Going back to the subject, Mr. President, I believe it would be the part of wisdom, if invited, and if accepted by the Commission, to have what we might please to call a commission **amicus curae** of about a dozen learned lawyers of the State, and they might have some suggestions to offer as to what certain given legal phrases were; certain men might be called into service that might have some suggestions to offer; they might want men specially on the drainage work—a certain lawyer they might want on that Commission who knew nothing about drainage work; they might have in mind a certain man, an able attorney, on that line of work, and some other able attorney on the road laws, and another specialist upon the school laws, and so on and so on. Then, I believe, if it is invited by the Commissioners, that it would be the part of wisdom for the Bar Association to appoint a commission **amicus curae** of perhaps a dozen men to sit with them or submit written suggestions upon any given subject-matter.

PRESIDENT WILBOURN: The motion before the Association is that the Chair appoint a committee of three members of this Association, who shall confer among themselves and with such members of the Code Commission as may be in attendance upon the Bar Association with a view to discovering how and in what manner this Association can best co-operate with the Code Commission in accordance with their wishes and suggestion. Is there any further

discussion of the motion? All in favor of it will say AYE; all opposed NO. The motion is carried, and I will appoint on that committee Judge Kimbrough, Mr. Dulaney, and Mr. W. W. Magruder.

We pass now to the report of the Committee on Judicial Administration, of which Judge Percy Bell is the chairman. I am glad to recognize Judge Percy Bell for the report of that Committee.

JUDGE PERCY BELL: Mr. President, and members of the Bar Association: The Committee on Judicial Administration has had a more or less fitful sort of time. The President asked us to meet, and we attempted to meet in Jackson, and two of the five got there. We discussed various measures and matters, including those who were not present, and we then submitted our conclusion to the other three, and we heard from one of them, in which he stated we were wise men, and of course we concurred in that; he told us to sign his name to the report and go ahead, which we have done.

I will state in the beginning, I do not expect the Bar Association to adopt the report. There are some matters in here that may seem revolutionary, but at least it will disturb our slumbers, and will get up a little discussion.

Hon. R. E. Wilbourn, President, and the Mississippi Bar Association:

Gentlemen:

Your Committee on Judicial Administration, begs leave to report as follows:

We have had an attempted meeting at Jackson, of the committee, of which only two were present, and after a thorough discussion we submitted to the other members of the committee our suggestions which were approved by one member, the other two members not responding. We therefore, submit this report as being the unanimous agreement of those of us who could be heard from.

FIRST—We believe that there should be a law passed creating a commission to meet with the Legislature for the purpose of framing their bills and seeing that they were in proper form and not unconstitutional or contradictory, which commission should also submit a report to each Legislature of such laws as are required to complete or round out our system. This commission should be non-partisan and non-political, so far as possible. Two members of it should be appointed by, say, the Supreme Court, one member by the Bar Association, and should be paid a reasonable compensation for their time which we would suggest to be the same compensation as that given the Legislators.

SECOND—We believe that there are more Judges and Chancellors now in the State of Mississippi than are required for the transaction of the business coming before the courts. A number of them work comparatively little of the time; we believe that the interests of the public would be conserved by decreasing the number of Chancellors from ten to six and by paying each of these six, seven thousand dollars per year. This would cost the State two thousand dollars per annum and in our opinion make the position such that outstanding members of the Bar would seek it. We think the Circuit Judges should be decreased from seventeen to ten, which would cost the State two

thousand more, making the total bill for the support of this branch of the judiciary, four thousand dollars more than it is now, but giving individual members a higher salary. While it would involve more work on the individual judges than the present system does, we believe that the plan would be better for the State and for the Judges. If the saláries should be fixed at $6,000.00, saving to the State would be twelve thousand dollars a year.

THIRD—There should be some provision whereby the Judges would be empowered to suspend sentences, or parole first offenders and compelled to put additional and heavier punishment upon recidivists.

FOUR—We are also of the opinion that a finding by eleven jurors in all criminal cases except capital cases would expedite the administration of justice.

FIVE—We recommend a provision which would permit the State to apply for and obtain a change of venue.

SIX—We are of the opinion that the Judges should be made more than umpires and given more power in order to speed up trials. The undue protraction of trials is a source of discontent with the administration of justice.

SEVEN—We incline to the belief that it would be advisable to provide that there should be no appeal in misdemeanor cases in which there is no imposition of a time sentence.

EIGHT—We also favor the redrafting of the County Court law, believing that this court, while very useful and serving an excellent purpose, is laboring under the disadvantage of operating under a somewhat carelessly drawn statute which should be improved. The Court should be made more accessible and less expensive.

NINE—We finally recommend that the exemptions in the Income Tax Law, of Mississippi, which law is closely modeled on the Federal statute, should be the same as the Federal exemption.

Respectfully submitted,

PERCY BELL,
JOHN A. SYKES,
ROBT. S. HALL.

In addition to these matters, the President just a few days ago directed my attention by letter to the proceedings of 1927. It seems that we, neither of us, were **particeps criminis** in those proceedings, and some of it had escaped us. He called my attention to the fact and asked my Committee to consider paragraph 1, on page 80, which was a recommendation on the question of the advisability of creating a jury commission to select jurors.

I will state, Mr. President, that our Committee has very hastily considered that matter since we have gotten here, and we do not see at present where there would be any useful purpose served by having the jury commission.

The second matter is on page 81, on the question of privileged communication, the suggested change in the statute which provided "this privilege shall not exist if the patient shall in any legal proceeding place in issue his or her physical condition, whether past or present".

We do not believe it would be advisable to adopt that statute, and for that reason have decided to recommend to this body that the law be left as it is on the subject.

Now, I think, as we have a number of suggestions here,

that if there is going to be a discussion on any of them that it will be well to consider it section by section. I will make a motion that the report be adopted, and if there be any objection we can take it up section by section.

MR. JOHN A. YEAGER: I second the motion.

MR. SAM H. LONG: I move the report be taken up section by section.

JUDGE PERCY BELL: I amend my motion to that effect—I move that the report be considered section by section.

MR. JOHN A. YEAGER: I second the motion.

PRESIDENT WILBOURN: You have heard the motion, that the report be considered section by section. All in favor of the motion will say AYE; opposed NO. The motion is carried, and we will consider the report section by section. We will take up the first section.

JUDGE PERCY BELL: First: We believe that there should be a law passed creating a commission to meet with the Legislature for the purpose of framing their bills and seeing that they were in proper form and not unconstitutional or contradictory, which commission should also submit a report to each legislature of such laws as are required to complete or round out our system. This commission should be non-partisan and non-political, so far as possible. Two members of it should be appointed by, say, the Supreme Court, one member by the Bar Association and should be paid a reasonable compensation for their time, which we would suggest to be the same compensation as that given the Legislators.

MR. SAM H. LONG: I move the consideration of that first section be turned over to the committee previously appointed, to be handled by them as they see fit.

JUDGE PERCY BELL: That committee, as I recall it, made its report approving that commission plan, and that report was adopted. There is no committee to consider that at all.

PRESIDENT WILBOURN: I take it that he has in mind referring that to the Committee of three.

MR. SAM H. LONG: My idea is not to shoot at the legislature with too many committees with too many different purposes.

JUDGE PERCY BELL: That committee of three is merely to meet with them and devise a plan whereby we can help them, and that committee would have no jurisdiction over this matter. As I understand it, all the conven-

tion would do in approving this report, or any part of it, would be to state it did approve it, and it would be natural to refer it to the Code Commission for its action.

MR. GEORGE BUTLER: It strikes me that, while the general purpose and scope of the first recommendation of this present committee is somewhat in line with the recommendation of the other committee, and the report of the other committee, which has been adopted, it is not altogether so, and that this recommendation might with propriety be referred to the committee which is to be appointed to carry out the purposes embodied in this first report.

PRESIDENT WILBOURN: You mean that committee to be appointed of two representatives of each district?

MR. GEORGE BUTLER: Yes, sir.

MR. SAM H. LONG: My motion was to refer the consideration of the recommendation and let this committee make recommendation in their report and in consideration with the codification committee, as to whether the legislature will appoint this committee or not.

PRESIDENT WILBOURN: You know the Bar Association has already authorized the appointment of a committee under the report of Judge Griffith's committee, to appoint a committee of two from each congressional district to have in hand the general subject of consistent and continuous reform.

MR. SAM H. LONG: I will withdraw my motion.

JUDGE PERCY BELL: You move this be referred to the committee that is to be appointed?

MR. SAM H. LONG: Yes, sir.

PRESIDENT WILBOURN: All in favor of that will say AYE; opposed NO. The motion is carried. We will take up the next section.

JUDGE PERCY BELL: The next section is as to the reduction of chancellors and judges, and paying them more salaries. The section reads: Second: We believe that there are more Judges and Chancellors now in the State of Mississippi, than are required for the transaction of the business coming before the Courts. A number of them work comparatively little of the time. We believe that the interest of the public would be conserved by decreasing the number of Chancellors from 10 to 6 and by paying each of these six, seven thousand dollars per year. This would cost the State two thousand dollars per annum and in our opinion make the position such that outstanding members of the Bar would seek it. We think the Circuit Judges

should be decreased from seventeen to ten, which would cost the state two thousand more, making the total bill for the support of this branch of the judiciary four thousand dollars more than it is now, but giving individual members a higher salary. While it would involve more work on the individual judges than the present system does, we believe that the plan would be better for the State and for the Judges. If the salaries should be fixed at $6,000.00 saving to the State would be twelve thousand dollars per year.

MR. GEORGE BUTLER. I move you that that section of the report be rejected.

MR. JOHN A. YEAGER: I second the motion, and in response to that, Mr. President, in 1924 we undertook that —to reduce the number of circuit and chancery court judges, and as a result we created a lot more county courts.

PRESIDENT WILBOURN: Is there any discussion of that motion?

JUDGE PERCY BELL: I would merely state that these different subjects are for the consideration of the convention. The Committee believes the plan would be a good idea. I believe the most of us know in our different districts, and over the State, the judges could do a great deal more work; we also know they should be better paid. The only way of doing the two that I know of is to decrease their number. We are certainly not going to appropriate more money to the payment of judges than we are paying now, and for that reason we believe that would be a good idea.

MR. GEORGE BUTLER: With reference to the motion, I just want to say this: That the recent session of the Legislature provided additional compensation for judges and chancellors, as I understand it. Not as much as some ought to have, and probably more than some of them are worth. But I am familiar with two or three of the judicial districts in Mississippi, chancery districts especially, and I do not very well see how we could decrease the number of chancellors in the State. Those people work all the time; they do not simply work in term time, but they work in vacation. You take in my district at Jackson, there is never a day that the Chancellor does not spend his morning at the courthouse passing on estate matters, and vacation matters. He works all the time. The terms of the court are so congested until he cannot dispatch the business, and he has to refer the cases to masters, with

result that the lawyer has to try his case before a master, have the report submitted, file exceptions to it, and then argue it again before the Court. I think that condition prevails in two or three other districts with which I am familiar; and I do not think it would be possible to reduce the chancery court districts and the circuit court districts to the small number suggested by that report.

JUDGE PERCY BELL: Will you permit a question?

MR. GEORGE BUTLER: Yes, sir.

JUDGE PERCY BELL: I dare say that is correct. Do you think that is the condition all over the State?

MR. GEORGE BUTLER: I think it is the condition over the State. I think it is the condition in the district in which Judge Cutrer presides.

MR. J. L. BYRD: I want to say that condition exists in the Second Chancery Court District, and exists in the district in which Philadelphia and Kosciusko, and those other towns are located. In fact, I do not know of a chancery court where the chancellor does not work all the time, both in court time and in vacation; and I think it is ridiculous to think about cutting down the number of chancellors from ten to six. It is not a question of whether they can do more than they are doing. Mr. President, you know, in our district we have seven counties, Meridian, Laurel, Newton, Forest, Brandon, Quitman, and every one of those towns and counties have a lot of vacation business; and not on the court terms, but the vacation business, keeps the Chancellor so busy that he does not have time to take a vacation at all.

JUDGE PERCY BELL: Is that the experience of the Bar as to the circuit judges also, that they are fully occupied? When we made that investigation there was one district, and only one, in the State in which his time was fully occupied.

MR. J. L. BYRD: I want to call your attention to this fact, too: Because a man is a judge is not any reason why he should work every day in the year. If a man is a judge and gives his honest efforts to solving the legal propositions that come before him—if he has to hold court at Clarksdale for three weeks he ought to have at least a week's rest, for he cannot pitch into another court without having some rest. You have to give a man time to recuperate.

MR. W. B. MIXON: Mr. President, and Members of the Bar Association: In regard to the investigation made in 1922, I will say that my observation since that time shows

me that the conditions do not obtain now that obtained at that time, especially in regard to the chancery court. There is a tendency on the part of the Bar with whom I am acquainted, and in the practice in which I am engaged, to take everything out of the circuit court that they can possibly get out and put it in the chancery court. I will tell you why. In my district—I do not speak for any district except mine—we are so clogged up in the circuit court with misdemeanor cases, little whiskey cases, little stealing cases, and things like that, until we never can get to the trial of important cases in the circuit court, though it looks like to me the county court for these larger counties will be the salvation for those counties, and will lend toward the administration of justice in those counties.

Now, in my county, for instance, we had a four-weeks term of court, and we did not try more than one or two important cases in that county. Most of the term was taken up by misdemeanor cases. It would take a whole day to try a fellow for selling or being found in possession of a pint of moonshine, and all that kind of thing; and there are a lot of things I could discuss. And if we could get a court that would administer justice in these counties promptly, that is, bring a fellow up, having arrested him, and when the court convenes on the following Monday try him and and send him to the county farm before he has time to go around and get the preachers and everybody else to begging the judge to let him off light, cut his fine low, or take his days off, that means we could administer law, we could get through with our courts, and we could try and devote our time to something really worth while.

Now, here is another thing that comes along—I notice the two propositions, and I would like to amend that report, but I am not a member of the committee, and I don't suppose I would have been there; I might have been like one of the three. But the question of the time consumed in selecting juries—why, I have seen a whole half day taken up in our recent term of court selecting a jury to try a case that did not involve more than fifty dollars; this question and that question—"Who is your great grandmother's first cousin", or something like that, and what you did for this one and that one. I noticed the other day, they put on a case that has been in the public eyes for years, and everybody in the United States knows about it—that Teapot Dome Case—and that judge selected that jury in less than

half a day to try that case; and here the lawyers take the time of the court on one of those little cases . . . . . .

MR. JOHN A. YEAGER: Will the gentlemen yield?

MR. W. B. MIXON: Yes. That is a familiar voice; I have listened to it for, lo! these many years.

MR. JOHN A. YEAGER: I want to ask the gentleman from Pike if it is not a fact that that jury that was selected up there so readily and so quickly didn't also turn the defendant loose right quick?

MR. W. B. MIXON: I presume they did so honestly.

PRESIDENT WILBOURN: The question before us is whether or not we will reject the report of the Committee on diminishing the number of judges and chancellors.

MR. W. B. MIXON: The question is, if we can get this riff-raff out of the circuit court, we can reduce the judges in the State.

JUDGE PERCY BELL: I ask general consent, to get at the sense of the Committee, that we split that up. I move the adoption of that report so far as it deals with the circuit judges.

PRESIDENT WILBOURN: Mr. Butler made a motion that that section be rejected.

JUDGE PERCY BELL: I offer that as a substitute —that that part dealing with the circuit judges be adopted, and that part dealing with the chancellors be rejected.

PRESIDENT WILBOURN: As I understand it, the question is: Mr. Bell offers as a substitute the adoption of this second section of the report, leaving out any proposal for the reduction of the number of chancellors, so that his motion is that we adopt the section recommending the reduction in the number of circuit judges from seventeen to ten. Is that correct?

MR. GEORGE BUTLER: I am opposed to that provision.

PRESIDENT WILBOURN: That is what is before the Association, offered as a substitute to yours.

MR. W. CALVIN WELLS: What becomes of that part of the report in regard to salaries?

MR. GEORGE BUTLER: You have your salaries coupled up there.

JUDGE PERCY BELL: No; each one is by itself.

MR. GEORGE BUTLER: You will have your circuit judge getting seven thousand dollars a year and the chancellor getting five thousand dollars a year.

MR. A. W. SHANDS: I am not certain, Mr. President,

that I understand the issue. I thought I did when I arose and challenged the attention of the Chair. As I understand it, the report of the Committee, and the reason for the recommendation of the Committee, was that we should reduce the number of chancellors and circuit judges in order that we might get a better salary for such chancellors and circuit judges who pass the ordeal of this reduction.

As for me, living my life as a lawyer; having had my training as a lawyer; knowing the pains and efforts that my father made to make me fit to be able to advise the people of the State of Mississippi who come into my office for advice; knowing that my advice, however good it may be; knowing that however much I may have studied the books; knowing that regardless of how sincere, how many wakeful hours I have spent when I should have been asleep trying to present matters to a court, would be all wasted unless I had a court worth while to present them to; knowing that the average lawyer of the State, regardless of his means, is little better paid than a mechanic who fixes a Ford, or an automobile, I am absolutely opposed to compromising in any way by the reduction of judges. I do not believe that there is a sufficient amount paid, and I honestly and frankly believe that by us coming here and saying we will trim down this, and make a man work a little bit more in order that the number of recipients of pay as judges is reduced, so that we can increase the salary—my judgment is this: That this Bar Association, recognizing the force and the power of the knowledge of the law, should stand up and say to the State of Mississippi, "you depend upon us to take care of your rights; we can do so if you will give us the right kind of men on the bench; you cannot get them unless you pay them the amount that that same man of brains can make in something else". As for me, I am opposed to any kind of compromise. A lawyer is trained, educated and skilled; he has spent his money and his time to achieve that skill; it is worth something. A man who is fit to be judge has the capacity to earn more than your five thousand dollars a year. I do not think we ought to cut it down.

So far as my chancery court district is concerned, my chancellor told me the other day that he had had to drop his life insurance; his wife is doing his cooking; he has three children. Before this legislature adjourned he told us he was going to resign. We are left without a chancellor, because he cannot support a wife and three children on the

salary that he gets. Now, then, what are we going to do? Your chancellor has control, not only of your property; he can take your wife and your very children away from you. We must have a good man. Now, we are not going to have a good man unless we have a salary. I do not think we should recommend any reduction at all. We cannot have him worked over time. I think this Bar Association should not trim corners at all; they should recognize that these men who are our judges and chancellors occupy the most responsible positions that anybody can occupy; and it is up to we lawyers to bring that home, and if we do not bring it home to the people of the State, we are recalcitrant to the trust imposed upon us. I know my circuit judge is occupied all the time; I know my chancellor is worked to death. I think we should not compromise, but we should go back to this legislature, regardless of whether we get results or not, and keep hammering at it, that the man who occupies that responsible position should have an increase in salary without having any number of them cut down; and I think it is up to the lawyers to stand up for what a lawyer is worth, and that he is worth more than a mere farm laborer; he is worth something more than a mere employee of a garage, or something like that, those that you pay a dollar an hour for labor, but you don't pay it to your judges. I am opposed to all of that, and I think this Bar Association should stand solidly shoulder to shoulder, that the judges are worth more money, and we cannot cut them down, regardless of how much it costs to impanel a jury, or regardless of how long it takes. The only thing on earth that is worth while is that justice shall be done, regardless of the cost.

I think that provision should be rejected; that we should stand unqualifiedly, and fearlessly, upon the proposition that we must have an increase in the salary of judges, so as to justify us in keeping those good judges that we have, and in those sections where we have not good judges to justify the very best lawyer in that district to aspire to become judge.

JUDGE A. J. McINTYRE: Just a word. The Chairman of the Committee was chancellor a few years ago when I was chancellor. I spent not only what money I had accumulated, but I had some boys and had to send them to college. And our present chancellor, no matter what the salary might be, whether ten thousand or four thousand dollars, you could not get a better chancellor in the district;

but he is breaking down, and is going to break under the work he is doing. He is a great fisherman, and he has not the time to fish. He holds twenty-six courts a year, and my experience is he does practically as much work in vacation as in court term, and I did while on the bench. And talking about the chancellors, especially in the First District, it cannot be done, and I am opposed to it. He is such a man that I doubt if he had been elected chancellor, but for the fact that he was appointed and made good, and he had no opposition. His salary is entirely too small; five thousand dollars a year is not sufficient. I was not much of a chancellor, or much of a lawyer, but five thousand dollars does not equal my practice, and not half of the work I had while on the bench.

JUDGE PERCY BELL: I think the gentlemen have all gotten confused. There is no idea on the part of the Committee to cut salaries, but was to raise salaries. I agree with him thoroughly. I think our judges are horribly underpaid. The idea of this Committee was that the number of judges could be decreased, because the work was not enough to keep them occupied. It is evident that the chancellors are not that way, and it was for that reason that I moved as a substitute that the report to reduce the number of chancellors be rejected.

MR. GEORGE BUTLER: With reference to the substitute, personally, if I vote on the matter, I want to reach an intelligent conclusion. I do not know, and I do not believe this Bar knows, whether or not from the statistics of the different districts the circuit judges can be reduced from seventeen to ten. I practice in a good many districts in the State, and I take it I am about as familiar with the condition in all the districts as any lawyer in the State, and I cannot vote intelligently upon that proposition, and I cannot vote to reduce the circuit judges from seventeen to ten.

The second proposition is, that the form that the recommendation now takes is that you pay your circuit judges seven thousand dollars a year, as much as you are paying your Supreme Court judges, and you pay your chancellors five thousand dollars a year. I do not think that is equitable and fair, and, therefore, I will be bound to vote against that substitute.

MR. J. L. BYRD: I move that section two of the report be tabled.

MR. JOHN A. YEAGER: I second that motion.

PRESIDENT WILBOURN: All in favor of that motion will say AYE; opposed NO. The motion is carried.

JUDGE PERCY BELL: I will read the Third Section: Third: There should be some provision whereby the Judges would be empowered to suspend sentences, or parole first offenders and compelled to put additional and heavier punishment upon recidivists.

I move the adoption of that section.

JUDGE A. J. McINTYRE: I second the motion.

PRESIDENT WILBOURN: All in favor of that motion to adopt the third section will say AYE; opposed NO. The motion is carried.

JUDGE PERCY BELL: This is the Fourth Section: Four: We are also of the opinion that a finding by eleven jurors in all criminal cases except capital cases would expedite the administration of justice.

MR. GEORGE BUTLER: I move that recommendation be rejected.

MR. H. V. WALL: I second the motion.

PRESIDENT WILBOURN: You have heard the motion to reject that last section. All in favor of that motion will say AYE; opposed NO. The AYES have it, and the recommendation is rejected.

JUDGE PERCY BELL: I will read Section Five: Five: We recommend a provision which would permit the State to apply for and obtain a change of venue.

MR. GEORGE BUTLER: I think that is very desirable, Mr. President, but the trouble is you have a constitutional provision in the way. You will have to amend the Constitution before you can do that.

MR. A. W. SHANDS: I move the adoption of that section.

MR. W. B. MIXON: I do not see how we can recommend a statute in conflict with the Constitution of the State of Mississippi.

PRESIDENT WILBOURN: The suggestion of the Committee is that some appropriate provision be made. Mr. Shands has made a motion for its adoption, but I did not hear a second.

MR. JOHN A. YEAGER: I second the motion.

PRESIDENT WILBOURN: All in favor of the motion say AYE; opposed NO. The motion is carried, and the section is adopted.

JUDGE PERCY BELL: I will read Section Six: Six: We are of the opinion that the judges should be made more

than umpires and given more power in order to speed up trials. The undue protraction of trials is a source of discontent with the administration of justice.

MR. A. T. STOVALL: I move the adoption of the section.

MR. W. B. MIXON: Now, Mr. President, and Members of the Association: I suppose I will propose something here that probably a great many of you, and maybe a majority of you, will differ from me; but I propose, or suggest, in connection with this proposition of the Committee that a statute be enacted whereby the Judge of the circuit court should deliver his charge orally to the jury in every case.

Gentlemen, I have seen the circuit judge use two hours to go over a little batch of instructions, and interline, and argue, and discuss with counsel on both sides as to what the law in the case. He is supposed to know the law. If instructions are brought in there—and they talk about a crazy quilt of patch work, when you have that you have a crazy quilt of patch work.

PRESIDENT WILBOURN: That suggestion is not involved in this particular matter being now considered.

MR. W. B. MIXON: He would be more than a mere umpire, if he was allowed to charge the jury.

JUDGE PERCY BELL: This does not describe methods; it is left to the legislature.

MR. W. W. MAGRUDER: I have been practicing law about thirty-three years, and I have never found the circuit judge was anything in the nature of umpire. I have found if the circuit judge was a capable good lawyer, he had all the power necessary to speed up the process of the court. Judge T. B. Carroll was my law partner for fourteen years, and I practiced law after that under him until Judge Carroll's death, and I want to tell you Judge Carroll was not an umpire; he was a circuit judge; and if you put men of high calibre and high qualifications on the circuit bench they will be judges, and it looks like that recommendation is mighty near a reflection on the judiciary of the State.

MR. E. C. SHARP: I would like to see that defeated, and if anybody here doubts that we need anything of that kind, or believe we need it, if they will arrange to have their judge change with some I can show them it will go down unanimously the next time, if your judge will exchange with him.

JUDGE PERCY BELL: The idea of the Committee,

I would like to state, is simply this: That under our present method of procedure a great deal of time is unnecessarily consumed—much more than in the English courts. I read in the American Bar Journal not long ago a very enenlightening article on that very subject. The English Judges, and in some cases the Federal Judges, can speed up their trial and shorten a trial; and the question our friend, Mixon, referred to, where it will take half a day to select a jury to try a fifty dollar case I had in mind. If the bar wants to continue under the present system, that is the very thing the civilized world is talking about.

MR. GEORGE BUTLER: I think the circuit judges of Mississippi at the present time are certainly more than an umpire; that is true of the district in which my practice is. All this stuff about the empaneling of the jury is the fault of the lawyer, and not the court. Let's correct our own conduct, and not tell the judge what to do. If a man goes up here and undertakes to empanel a jury and takes that half day in the trial of the fifty dollar lawsuit, that lawyer is not doing his duty to his client, and not carrying out the oath of his office.

JUDGE PERCY BELL: Will the gentleman yield?

MR. GEORGE BUTLER: Yes, sir.

JUDGE PERCY BELL: How is he permitted to do it? How can he do it? How can he take a half a day if the Judge could stop him?

MR. GEORGE BUTLER: I think the Judge could stop him; I think it would be stopped in my district.

MR.———————————— Some years ago our circuit judges adopted a rule in Mississippi providing that the judges should do the very thing we want today, and we lawyers hot-footed it to the legislature and had it abolished. As Mr. Sharp says, if the gentlemen has trouble in his district, there are many judges in this State that can demonstrate to him in the trial of one case on the first day of the term that we do not need any additional power vested in the circuit judges. In my judgment, the motion to reject should prevail.

PRESIDENT WILBOURN: The way, as I understand the motions, we will have to put the motion to adopt first, for the reason that the motion to reject is not a motion to table the motion to adopt.

There upon a motion was made, and seconded, to table the motion to adopt the section.

PRESIDENT WILBOURN: All in favor of the motion

to table the motion to adopt, your action on which will probably dispose of the matter, will let it be known by saying AYE; all opposed to tabling the motion to adopt will let it be known by the contrary sign NO. The motion is carried and the section is tabled.

JUDGE PERCY BELL: Now Section No. Seven, the suggestion of one of our members who was a circuit Judge, and I think a good one. Seven: We incline to the belief that it would be advisable to provide that there should be no appeal in misdemeanor cases in which there is no imposition of a time sentence.

I move its adoption.

MR. ROBERT H. POWELL: I move that section be tabled.

MR. J. L. BYRD: I second the motion.

PRESIDENT WILBOURN: All in favor of the motion to table will say AYE; all opposed NO. The section is tabled.

JUDGE PERCY BELL: I will read Section Eight: Eight: We also favor the re-drafting of the County Court law, believing that this court, while very useful and serving an excellent purpose, is laboring under the disadvantage of operating under a somewhat carelessly drawn statute which should be improved. The court should be made more accessible and less expensive.

I move its adoption.

MR. TAYLOR: I second the motion.

PRESIDENT WILBOURN: All in favor of the motion to adopt that section let it be known by saying AYE; all opposed NO. The AYES have it, and the section is adopted.

JUDGE PERCY BELL: The next is Section Nine. Nine: We finally recommend that the exemptions in the Income Tax Law of Mississippi, which law is closely modeled on the Federal statute, should be the same as the Federal exemption.

I move its adoption.

MR. BERRY: I second the motion.

JUDGE PERCY BELL: I will disturb your slumbers only a short time longer.

"We do not recommend the creation of a jury commission."

I move the adoption of that section.

MR. BERRY: I second the motion.

PRESIDENT WILBOURN: Is there any discussion?

If not, all in favor of the adoption of that section will say AYE; opposed NO. The motion is carried.

JUDGE PERCY BELL: We do not recommend the amendment of the physician's privilege act, that was brought to the attention of the Committee, and let me say that the present law reads:

"All communications made to a physician or surgeon by a patient under his charge or by one seeking professional advice, are hereby declared to be privileged, and such physician or surgeon shall not be required to disclose the same in any legal proceeding, except at the instance of the patient."

And this was suggested by the last Committee:

"Provided, however, this privilege shall not exist if the patient shall in any legal proceeding place in issue his or her physical condition, whether past or present."

We think the provision is too wide, and there should be no change.

MR. A. W. SHANDS: Mr. President, that is a matter to which I have addressed something more than casual thought. When a witness is sworn, to take up just a moment the idea underlying the secrecy, or the privilege of communications between patient and physician, it is that a man in order that he may be made physicially whole shall have the right to go to some man and tell him the truth. Now, that is all that a good physician wants you to tell him—is the truth. When a witness is sworn in the courts of justice, he is sworn to tell the truth, the whole truth, and nothing but the truth; and theoretically witnesses do that.

Now, then, the reason for the first rule is that this patient can go and tell the physician what? The truth. He goes and puts into issue his physical condition. He cannot do it until he has taken the oath that he is going to tell the truth, the whole truth, and nothing but the truth. Now, let us presume that he has regard for his oath, and he tells the whole truth about his physical condition; that is what he has put in issue; that is what the jury is to pass upon; he has come and sworn and called God to be his witness that he is going to tell the truth, the whole truth, and nothing but the truth. What does that mean? Does that mean that I want some physician here to hush about what was my condition? Not if he is an honest man; and not if the courts are not to be treated as basket balls, to be tossed around, and foolishness made of them. He comes and he tells the court, and tells the jury. I have told you the

whole truth as to my physical condition; he goes and tells the physician, I am telling you the whole truth. For what? In order that you may treat me. He says to the jury: I am telling you this thing that I claim to be the whole truth. For what? To get some money.

MR. W. B. MIXON: Will the gentleman yield to a friendly question?

MR. A. W. SHANDS: Absolutely.

MR. W. B. MIXON: If he is telling the whole truth, there would be no necessity for the rule.

MR. A. W. SHANDS: That is exactly what I am telling about now. He swears he will do that. Then, if he has told the truth about it, the physician cannot contradict him. If he has gone there and sworn to a damn lie he ought not to get away with the swag.

Now, that thing is among the many other things wrong with the law, and if this Bar Association means anything on earth; if our meeting here is anything other than merely social—and with that I get more pleasure than any other man, I believe, that belongs to the Bar Association—but if it means anything at all, it means that we strike down these barriers that are in the way of justice, and I say that that thing is a relic of barbarism, to say that a man can come in and say: Now, I have told you the whole truth; I call God to be my witness that I have told the truth, and I am not going to let anybody else come in here and tell something that is in conflict with the lie I am telling on the witness stand today.

MR. D. A. McINTOSH: Is it fair, and right, and honest for a man to bring a suit, and introduce one doctor who will testify as he wants him to, and to say to the other doctors who shall come in that they shall not testify?

MR. A. W. SHANDS: It is not in hollering distance of the same township and range of fairness. It is just a cloak of fraud of the worst kind, and it is a thing that a lawyer has got a right to stand up on his hind legs at. It is indefensible according to logic, good morals, common honesty or common decency. If that man goes upon the witness stand and says: "I am telling you the whole truth about what is wrong with me", then certainly he cannot say that he wants to keep that a secret, because he has already told it. Now, unless he puts that in issue himself; unless he himself places his physical condition in issue, then the mouth of that great healer should be closed; but the ex-

ception should be put in there. It will always be privileged unless he himself puts his physical condition in issue.

MR. GEORGE BUTLER: Will you yield?

MR. A. W. SHANDS: Yes, sir.

MR. GEORGE BUTLER: Suppose a suit should be brought on an insurance policy where the insured warranted he was in good health, and the insurance company should plead a breach of the warranty of health, would that be in issue?

MR. A. W. SHANDS: That is an impracticable question there, for the simple reason that when you sign an application . . . . . .

MR. GEORGE BUTLER: The Supreme Court has decided it; it is something you are confronted with.

MR. A. W. SHANDS: I have recently had occasion to try some of those, but if it is not right, it is not right; and if he has perpetrated a fraud, I do not think this Association should go on record anywhere, at any time, as being in favor of anything that will cover up a fraud. When the issue is made, when he is asserting it, when I think every man should be held to prove the truth of his assertion, and if he asserts his good health, I do not think it should be open to collateral attack, for me to go out with something else, but when that is made the issue in a lawsuit, and he is trying to profit by a representation he has made of his health in order to get some money out of it, I think it should be permitted. It comes up not only in damage suits of every kind, but mal-practice, and things of that kind. I am thoroughly opposed to this provision if it is extended to—in other words, if the patient himself, or anyone in privy with him, is claiming the benefits of it, I think it should not be invoked by him.

MR. SAM H. LONG: Mr. President: That practically means a repeal of this section, because there is no time at which it could be used except when the issue of the man's health was involved. We all know that. This question as to it coming up in mal-practice suits you need not worry about; plenty of doctors will be there when you get up a mal-practice suit to testify for the doctor you are suing, and they will not be privileged. We all recognize that this is aimed at the personal damage practice of our state. The question is this: You take the average man that gets hurt and he immediately gets in the hands of the corporation, railroad, telephone company, or some other such company's doctor; he is immediately turned over to them; he is kept

in their charge until quite a little bit; and I would not assume that the man is going to tell the truth, or that he is going to tell a lie, about his physical condition; we have no right to assume that that doctor, by reason of the fact that all of his sympathies are with the other side, will tell the truth; and as long as he is in the hands of the Philistines, my idea is to let this thing protect him, and I am in favor of Judge Bell's side of this thing.

MR. S. C. MIZE: I agree with my friends; there are two sides to every question. But it has come to the point in this day in the trial of lawsuits where the patient rarely ever has his own physician any more, as suggested by Mr. Bower. He is in the hands of a hospital, in the ward of a railroad company. In this town to my knowledge the railroad companies maintain two wards at the hospitals, and if it is one of automobiles, or master and servant, which is covered by insurance, he is sent to the hospital, the company's physician is sent to him, and the first man that gets the information from that doctor is not the patient, but it is the insurance company. I have had it on one occasion to happen where my patient paid the X-Ray bill, and when I called for the X-Ray picture on the trial of the case it was in the hands of the insurance company, without any permission or consent on the part of the client.

Now, in any method of procedure we adopt there will be some miscarriages of justice; that is absolutely beyond prevention; and the question comes, in what manner will there be fewer miscarriages, and in my judgment if there is a fraud perpetrated, which there occasionally will be, on the court, it will be less likely perpetrated with this statute remaining privileged as it is, because there are other methods of proving whether a man is faking his injuries; you can prove it by his neighbors, and his acquaintances, and the juries if he doesn't put the doctor on the stand are warranted in drawing unfavorable inferences, which they will most likely do. And in my judgment the fewest miscarriages of justice will happen by the statute remaining as it is. There ought to be a physician to whom the patient may go, knowing whatever he says is privileged absolutely; and then if it results in a trial of a lawsuit where they think that patient is perpetrating a fraud, it can be proven by other methods. So, in my judgment this statute should remain as it is.

MR. J. L. HEISS: I have listened to this discussion, and it seems this has developed between two sets of lawyers,

one which is representing the plaintiffs in damage suits, and the other the insurance companies. Now, they file that report, not from our point of view as to our individual cases, and I think the lawyers should pass upon this, and that is why I am opposed to resolutions that the body has no time to consider; just come here and vote for and against without any deliberations, and really represent nothing from this Bar of this State, and we go through a lot of form . . . .

JUDGE PERCY BELL: This happens to be one exception. This is the one thing that was in last year's report, and has been before you for a year.

MR. J. L. HEISS: I am glad to hear that. I assume all members who are here now were at the last Bar Association. Probably this contains a larger number than ever attended a Bar Association; and I say for that reason the question of what I might think, or my friend might think, ought not to be considered by the Bar. Now, I do express some surprise that this Committee would report on an important matter of that kind a general statement that it is too broad. I would think that a matter of that sort, we ought to have probably a report which embraces the criticism of that measure, wherein it was too broad.

MR. GEORGE BUTLER: I dislike very much to speak on every proposition that comes up; but I feel like I am probably in a position that few other lawyers here are in. I do not represent any plaintiffs in any damage suits; I represent a good many insurance companies that carry liability policies; I represent some public service corporations that have their own physician. I happen to be the head of a little organization that employs a good many men that get hurt. The policy of this organization is to send those injured employees to the company's doctor or to the insurance company's doctor. Now, if I was looking at it from a purely selfish standpoint, when that injured employee brought suit against the company or against the insurance company that I happened to represent, I would be very much gratified indeed if I could put that physician, selected and paid by that organization with which I am connected, on the witness stand, and inquire into, and search into, the truth of what the plaintiff had said; I would be highly gratified if I could do that; I would like to do that as a lawyer at the bar; but I do not think it is right, and we should not, as citizens of Mississippi, recommend to the legislature that they adopt a policy which

would serve our own particular and peculiar interests. This is no new proposition; we have had it before this Association, as the records will show, for at least ten years. We debated it at Laurel a few years ago when Judge Deavours was President of this Association, and almost broke up in a row; we have repeatedly had this question before us; we have repeatedly had it forced on the legislature. A bill framed exactly like this bill was recommended by this last committee has gone before the legislature; the damage suit lawyers on one side and largely the public service lawyers on the other have lined up for and against. That kind of business does not help the State and does not help this Association; and I say we ought not now to try to force through here a highly conrtoverted proposition like that, whatever our individual views might be; and so far as I am concerned, I agree with the report of the Committee.

PRESIDENT WILBOURN: I am afraid we do not understand this exactly. The report of the Committee is to the effect, if I understand correctly, that they recommend that the privileged communciation statute be left as it is; and if you adopt the report of this Committee you put this Association on record as approving that statute as it is now written.

JUDGE PERCY BELL: It does not recommend any change in that statute. Let us get this straight. At the last session this matter was brought up. It evidently produced a row on that occasion; and then Mr. Flowers offered a substitute to this effect: That the incoming President, or that the Committee on Judicial Administration, be requested to prepare another measure for submission to the Bar Association at the next meeting in undertaking to reconcile the conflicting views about this statute, without any recommendation. We met and decided we had nothing to recommend; we had nothing to recommend in the way of a change in the statute one way or the other, and that is our report.

MR. H. B. GREAVES: I move that the report be adopted, and on that I move the previous question.

PRESIDENT WILBOURN: I promised to recognize Mr. Jacobson.

MR. W. B. MIXON: A question for information. If we adopt this report, that will put the Bar Association in favor of the statute?

JUDGE PERCY BELL: This Committee says it has no recommendation to make.

MR. GABE JACOBSON: Mr. President, and Gentlemen of the Bar: It is my position here that the Bar Association not take any stand, one way or the other, on this statute, and here is my observation about the dangers and iniquitous practice: I do not think it is so much the statute, but I think it is the lawyer. Now, I will tell you why I think it is the lawyer. I think it is the duty of the Bar Association to elevate the morals, the standard and the ethics of the profession, so that when the officers of the courts, the lawyers, have the matter in hand they ought to see that justice is done. Here is where the statute appears to me to be misused: It is not the doctor who waited on the plaintiff, the patient, that the attorney for the plaintiff, the patient, objects; the question that comes up before the jury is not the man's suffering at all; he can tell about that; it is not how long he lingered in bed; he can tell about that. But the sole question they want to get to the jury is the permanency of the injury; whether or not the man is permanently injured. What do they do? What do we members of the State Bar Association do. I will say that, and the lawyers of the State, if they have a doctor who will say this man is not permanently injured, they will not use him; they will go over to doctor after doctor until they will find one who says that he is permanently injured, and it often occurs when the doctor takes the stand he says that he never saw that man but a day or two before the trial, and he made the examination of him, and his injuries are permanent; then they put that doctor on that says his injuries are permanent, and exclude every other doctor that ever looked at him. That isn't the statute. The statute isn't in fault there, because they do not put on those other doctors; but it is the practice of the lawyer that will hunt for a doctor who will say he is permanently injured, and not permit another doctor to examine him and say what his opinion is of him. So, after all, the statute is not bad, in my mind; but, it goes back to the practice, the ethics of the practice in the State, where they will hunt for a doctor who will say he is permanently injured, and even keep off the other doctors who say he is not permanently injured. And, therefore, I say we ought not to say one way or the other as to the statute. It has some good effects; the patient is entitled to something; but it is after all the iniquities of the unethical practice; and that is what the Bar Association has to go after in the last analysis—we have to raise the ethics of the lawyer who practices in the profession.

MR. DAN TAYLOR: I do not expect to have but few words to say. I endorse what my friend, Mr. Jacobson, says. What we want to do is clean up our Bar; clean up the lawyers. They are the ones. If he is an honest, straight lawyer, he will not put a man on who will swear a lie, doctor or anybody else. I know they go out and hunt up those kind of lawyers; I know some of them I could mention that are constantly called in that kind of cases. What we want to do is clean up our own body, and get the rascals out; put them out of the practice in the State of Mississippi, and have a clean Bar. I just want to say that I endorse what Mr. Jacobson says.

JUDGE A. J. McINTYRE: I move to table this motion.

JUDGE W. W. MAGRUDER: In order to clarify this situation, and there seems to be some misapprehension, I move as a substitute for Judge Bell's motion, that the report of the Committee on this subject be received without action for or against the report.

JUDGE PERCY BELL: That's exactly what the report of the Committee is, that it declines to take any action.

PRESIDENT WILBOURN: There is a motion to table the motion to approve the report of the Committee.

JUDGE STONE DEAVOURS: I do not want to take any part in the debate, but it happened Mr. Butler called my name and said this matter was fully debated at Laurel when I was President of the Association. A very interesting debate it was. I had nothing to do with it. I do not want the impression to get out that I had anything to do with this matter being debated at Laurel. Expressing my individual view about it, I am in favor of letting it alone as it is written in the Code now.

MR. DAN TAYLOR: I want to say that I appreciate the frankness of Judge Stone Deavours, and I express my gratitude for the frankness of this Committee in stating that it is their opinion and sentiment that this statute should remain intact. This matter has been before this Association for the past five years, and it seems to be the outstanding sentiment of the Association that it stay as it is, and I trust it shall continue to remain as it is.

PRESIDENT WILBOURN: The matter will come up on the motion to table the motion to adopt the report of the Committee. All in favor of the motion to table will say AYE; opposed NO. The AYES seem to have it—the AYES have it, and the matter is tabled.

JUDGE KIMBROUGH: I notice on the program tomorrow, the first thing, Judge C. B. Ames will speak.

PRESIDENT WILBOURN: I think his address will come at ten o'clock in the morning. In order to finish the work of receiving and passing on the reports of the Committees, we will have to assemble somewhat earlier in the morning. The address of Mr. Ames will be delivered in this room in the morning at ten o'clock, and I suggest that we re-assemble in the morning at nine o'clock for the further reports of committees. If we do not do that we may not have time to dispose of the work of the Association.

Upon motion, duly seconded, and carried the Association adjourned until nine o'clock a. m., on Tuesday, May 3rd, 1928.

SECOND DAY

The Association was called to order at nine o'clock a. m. on Tuesday, May 3rd, 1928, by the President.

PRESIDENT WILBOURN: When we adjourned yesterday, we had under consideration the reports of Committees. I believe I will recognize Judge Deavours at this time to present the report of the Committee on Professional Ethics.

JUDGE STONE DEAVOURS: Mr. President: The report of the Committee on Professional Ethics is very brief. It was prepared by Judge R. H. Thompson, the nester of the Bar of the State. I will read it:

REPORT OF COMMITTEE ON PROFESSIONAL ETHICS

To the Mississippi State Bar Association.

Mr. President:

Your Committee on Professional Ethics respectfully reports:

The Association's Code of Ethics is an admirable one; it needs no amendments or supplements, unless practices have come into vogue since its adoption which warrant supplements. The reports made by the Association's Committee on Grievances at several of our previous meetings show many evils that should be remedied. These reported evils are not attributable to defects in our Code of Ethics, but are plain violations of its precepts. While the evils mentioned are beyond the scope of this committee, it trusts to be pardoned for suggesting that the Committee on Grievances deal with them more vigorously in the future than has been done in the past.

This Association's Code of Ethics is largely the same as that of the American Bar Association. At the last meeting of the American Association, held in Buffalo, New York, August 31 and September 2 and 3, 1927, six of the seven members of its committee on "Professional Ethics and Grievances", composed of eminent lawyers, made an elaborate report to the Association, proposing several supplements to its Code of Ethics largely because of practices coming into vogue since its Code was adopted. These proposed supplements are set out in full on pages 379 to 387 of the volume, entitled, "Reports of American Bar Association, Vol. 52, 1927".

The American Bar Association at its last meeting did not take final action on the proposed supplements to its Code of Ethics, but postponed action thereon until its next or 1928 meeting to be held in July next, thus giving its members ample opportunity to consider them.

Your committee does not ask this Association to adopt at this meeting the supplements proposed to the American Bar Association's Code of Ethics as supplements to its own code, but regards them of sufficient importance to be called to the attention of this Association. Before our next or 1929 meeting, the American Bar Association in all probability will have taken definite action on the proposed supplements to its Code of Ethics before our next meeting and the members of this Association at its next meeting will have the benefit of the discussions of the supplements in the American Association and the results of its deliberations on them.

Your committee calls attention to the fact that the Association's Code of Ethics has not been published in the Reports of its annual meetings for a number of years; and it apprehends the Code is not now readily accessible to many lawyers of the state and perhaps not to a considerable number of the members of this Association.

Wherefore, your committee recommends the adoption of the following resolutions:

1. *Resolved,* that this report be received; be made of record, referred to the Committee on Professional Ethics to be appointed by the President of this Association elected at this meeting and that said committee be and hereby is instructed to make careful study of the proposed supplements to the Code of Ethics of the American Bar Association and report to this Association at its next meeting as to the advisability of adopting supplements to its own Code of Ethics.

2. *Resolved,* that the Secretary be requested to have this Association's Code of Ethics re-published in the minutes of the proceedings of this meeting, thereby making it more accessible to the members of the Association.

R. H. THOMPSON, Chairman,
A. T. STOVALL,
J. S. SEXTON,
W. A. WHITE.

I move, Mr. President, the adoption of the report.

MR. HEIDELBERG: I second the motion.

PRESIDENT WILBOURN: Is there any discussion of the report of the Committee? If not, all in favor of the motion will say AYE; opposed NO. The motion is carried and the report is adopted. Is Judge Smith in the room? Judge, will you come forward and present a matter that you have in mind?

JUDGE SYDNEY SMITH: I appear before you gentlemen, both with the consent and the approval of the President, because I wished to, and carrying out what I presume was a promise I made to the Director of the American Law Institute.

I want to do two things. First: I want to call your attention again to the work being done by the American Law Institute, with which doubtless most of you are familiar; but broadly speaking, I remind you that the American Law Institute is engaged in re-stating the common law. It is doing the work that Tribonian and his associates did for Justinian, but is doing it, and I am speaking

I think advisedly, in a very much more systematic way, and taking very very much more time to do it.

The American Law Institute, as you know, is an organization that was formed in 1923, I believe it was. Lawyers and judges from all over the Union met in Washington and formed it, and it is composed of the presiding judge of each court of last resort, who is ex-officio a member, and of quite a number of lawyers scattered all over the Union who have been elected to life membership. The President of the Association is Mr. Wickersham; the President Emeritus is Mr. Root, who is largely responsible for its formation.

The Institute is financed by the Rockefeller Foundation, which put up not quite two million dollars. Its governing body is a council, of which Mr. Wickersham is the Chairman, and on which are Mr. Hughes, Mr. Root, and quite a number of lawyers of that type, Judge Cordoza of New York, one of the greatest living American jurists, Judge Parker, of the Supreme Court of Washington, Judge Rosenberry, of Wisconsin, and men of that type.

The work is being done in this way: The subjects were separated, and each subject, like the law of contracts, for instance, was assigned to one group, consisting generally of six men, one of whom is the reporter, and the reporter for Contracts is Mr. Williston, of Harvard, the author of the Law of Contracts; he has an assistant, who is a man almost of his type and ability, and four other advisors. Mr. Williston and his assistants in stating the law of Contracts, and the others do it in the same way, state each proposition in the form of a concrete rule, published in black letter type; that is followed up by a commentary—an illustrated comment—composed largely of cases, not citation of authorities, but the actual cases, indicating what the black letter means. That is submitted by Mr. Williston and his assistant to his advisors, and after repeated conferences with them, their work is submitted to the Council and revised, and I think I can give you my assurance that it is most carefully done. After being corrected by the Council it is referred back to the reporter and put into shape, and again submitted to the Council, and if tentatively approved by the Council is submitted at the general Association, which met last week, and at that Association there were five hundred or more in attendance last week. The report is read section by section and is criticised. It has been distributed before. A lot of criticisms go in by mail. And I

want to tell you it is criticised without any care for the reporter's feelings. This debate we had here yesterday was not a circumstance, all of which is taken down by a stenographer, and the reporter then takes his work up for re-consideration in the light of that criticism by judges and active practitioners; then it is revised in the light of that criticism and again submitted at the next annual meeting until it is finally whipped into shape. Some of you have seen that. They have progressed far enough now to make it practically sure that the work on Contracts will be released in probably three or four years. The Conflict of Laws is very nearly finished. Mr. Mechem, who is the reporter on Agency, told me he thought his work would be completed in three years. They have published a number of tentative re-statements; they are practically final, as far as that goes, but not finally approved. They released last week the first 177 sections of the law of Contracts finally. The re-statement is to be published in one volume, to be accompanied by another volume, a companion volume, which they call the commentary, which shows the development of the rule of law, and what the courts have decided. That is the work.

Heretofore the Association has not encouraged the use of its publiciations by the Bar and by the Bench because they are tentative; but as its work is now approaching perfection it is willing for it to be used by the profession and by the courts, and some of the courts have been citing it. I, myself, use it in my own work; have for sometime, though I have not cited it.

The first thing I want to suggest, and I hope you will give wide publicity to it, is that if you use this re-statement in the preparation of your briefs it will be of vast assistance to you, because when you find the rule of law governing the case that you have under consideration stated in this re-statement, then you have got a concrete statement of what, in the judgment of that Committee, is the common law, and all you have to do then is to call the court's attention to that re-statement and the pertinent decisions of Mississippi. Of course, if there is a Mississippi case in point that would control; but if there is not a Mississippi case, what the court would want to know is how the court has dealt with similar propositions, or whether there is a pertinent statute. I am going to request, if that is not improper, that the Bar use this re-statement in their briefs, and I want to assure you that the court will use it. I have

the permission of the judges to say that they will use it in the consideration of the cases in the preparation of opinions. You can obtain these re-statements from the Director, Mr. William Draper Lewis, 3400 Chestnut Street, Philadelphia, and they will cost you from forty cents to $1.25, and I think there are not exceeding ten; altogether they will cost you six or seven dollars, but they are well worth that.

The other proposition is this: The value of that re-statement to the local attorney will be very much enhanced if accompanying the re-statement is a notation setting forth the pertinent decisions in the local jurisdiction, and as well the pertinent statutes of the state, because the court could not use the re-statement without knowing what its own decisions relative to the rule have been, and whether there are any statutes governing it. The Bar Association of Michigan has had the re-statements annotated with their own decisions and with their statutes of that State. The work was done for them by Mr. Goodrich of the University of Michigan, and it was superbly done; the Council of the Association were very much struck with the proposition, and after considering that one question for practically the major part of a day, they decided to request, or rather suggest to all of the bar associations that they do similar work; that they have these re-statements annotated in the form I have suggested to you and distributed among the members of the Bar, either at the expense of the Association, or whatever way they could do it.

I heard Senator Pepper state that the Bar Association of Pennsylvania had their work well under way. Quite a number have acted on the suggestion, and you can see the great value of that work to the Bar and the Bench of the State, and it will be one way of making the work popular with the lawyers. And I want to say to you now, that I have not the remotest doubt in my mind—I have been closely connected with this work for several years— that when the re-statement is finally published that it is going to be followed by practically all the courts in the Union wherever a prior decision has not decided the rule in a contrary way. There are several reasons: It is easy to follow; your work is very much lessened; you have behind it the sanction of a body of men whose knowledge of the law is bound to be as good as that of any group of men you could assemble in the American Union; the carefulness with which it is done will commend it to you; and the

facility and ease with which the lawyer can find the rule. Brother Bowers remembers when we were young men there was a musical comedy called "King Do-Do". It came through this country several times, and one of the choruses, a sextette, sang, and each verse wound up with the lines "We will look in the book and see". That is practically all you will have to do. It is not a great job to do. I looked at Mr. Goodrich's work, and I examined our digest to see how big a job it would be; it is not as much as it looks on the surface; I could take one of the subjects and do it myself in a little while.

I want to suggest that you adopt a resolution today appointing a committee that will be charged with the duty of obtaining the annotation of these re-statements for the purpose of being published, and let that committee report at the next session, and then you gentlemen can determine how it is to be published and distributed.

I want to assure you that if you will use the restatements it will be of great advantage to you and the courts; and if you will permit this work to be done under the sanction of the Bar Association to give it standing and authority—it is to be done in co-operation with and under the direction of the Council of the American Law Institute—if you will sanction such a committee and permit this work to be done, I am sure you will not only not regret it, but you will be delighted to say that the Mississippi Bar Association has co-operated in what, in my judgment—is a most monumental work, work that will redound most to the credit of the Bar and will justify—I am measuring my words—we said yesterday we must justify ourselves to the people, like some other professions have—it will be one undertaking which, when brought to perfection, will justify the existence of the American Bar to the American people, and go very far toward removing any prejudice—may I use the word?—I don't know whether it is correct or not—which seems to be arising in the minds of some people against lawyers as a class, because they think they are actuated by selfish, and not altruistic motives in what they say.

MR. GEORGE BUTLER: Mr. President: In line with the suggestion of the Chief Justice, I have a resolution which I would like to offer. Shall I read it, or have the secretary to read it?

PRESIDENT WILBOURN: You read it.

MR. GEORGE BUTLER: The resolution is as follows:

Resolved by the Mississippi State Bar Association:

(1) That a committee of three be appointed by the President of the Association from its members, to be charged with the duty of preparing annotations for publication by the Association, of the Re-statement of the Law of the American Law Institute, with the Mississippi Statutes and decisions of the Mississippi Supreme Court.

(2) Such annotations shall cite all relevant state decisions and statutes, and indicate their agreement or disagreement with the rules of law as stated in the Re-statement. And shall also indicate the instances in which there is no Mississippi authority.

(3) The work hereby contemplated may be done by the members of the committee themselves, or under their supervision by others selected by them, and shall be done in cooperation with, and under the advice of, the American Law Institute.

(4) This committe shall report to the next meeting of this Association, and thereafter annually until discharged. In its first report, it shall suggest to the Association a method for the publication and distribution of the annotations.

(5) Appointments to this committee shall be for the period of its continuance; all vancancies therein shall be filled by appointment by the President.

I move you, sir, the adoption of that resolution.

MR. W. CALVIN WELLS: I second the motion.

PRESIDENT WILBOURN: You have heard the motion. Is there any discussion of it?

MR. W. B. MIXON: I want to know what it is. I would like to have that explained.

PRESIDENT WILBOURN: Mr. Butler, will you make a statement regarding it?

MR. GEORGE BUTLER: It was the purpose of the resolution, Mr. President, and Gentlemen of the Bar Association, to carry out what I understood to be the program of work outlined by the American Law Institute and to insure that the text prepared by that Institute of the restatement of the common law would be annotated with reference to the Mississippi decisions, and also with reference to the Mississippi statutes which changed or modified the common law as re-stated in that text. It is contemplated by this resolution that this committee shall co-operate with and do this annotation work in connection with the Ameri-

can Law Institute. They may do it themselves, or they may arrange with others to do the work under their supervision. After this annotation is properly made under the supervision of this committee, or by the committee, with the co-operation of the American Law Institute, it is contemplated that the text by the American Law Institute with the comments, as mentioned by the Chief Justice, together with these annotations, shall be published and made available to the Bar. Judge, have you with you at this time a copy of the work of the Michigan Bar?

JUDGE SYDNEY SMITH: I left it in my room.

MR. GEORGE BUTLER: I will state this: That I have seen the work that Judge Smith mentioned as having been done by the Michigan Bar; it is in pamphlet form. It gives the text of the American Law Institute followed by the comments of the American Law Institute, as outlined by Judge Smith, and under that in small type is annotated the Michigan cases, or the Michigan statutes, and if there are no Michigan statutes, or if the common law rule is not affected by the Michigan statute, then that fact is noted. So that a Mississippi practitioner, when he takes up this re-statement of the law, together with the comments, and reads it, he at once knows whether or not Mississippi has any statute which affects it, or whether Mississippi has any decision of the court which affects it; so that, as suggested by Judge Smith about the little song, all you have to do is "Look in the Book and See".

Now, as to how this publication would be made, and the distribution of it, is the difficult question that is to be worked out along practical lines by this Committee.

PRESIDENT WILBOURN: You have heard the resolution, and its explanation by Mr. Butler, and also the remarks of Judge Smith, regarding this important matter; all in favor of adopting the resolution will let it be known by saying AYE; all opposed NO. The motion is carried.

At this time I would like to recognize Judge Kimbrough, who I understand, has some matters to present.

JUDGE T. C. KIMBROUGH: Mr. President, and Gentlemen of the Association: The President of the Association on yesterday in his message to the Association made a suggestion which I want to get before the Association this morning.

The suggestion was about this: That the Mississippi State Bar Association join with the School of Law at the University of Mississippi in the publication of a law

journal; this law journal to be under the management, as suggested, of the President of the Bar Association and the School of Law. There are to be issued four separate editions of it each year; that is, quarterly, and one to be gotten out by the Bar Association, the other to be gotten out in some other way. The thing the Bar Association would be concerned about would be the issue it got out. The issue to be gotten out by the Bar Association would undertake to give the proceedings, for instance, of the convention. It is estimated that it would cost about $400.00 to get out this part of the work, and would be about the same as having published and put into pamphlet form the proceedings of the meeting of the Bar Association.

The journal would be a medium for the Bar Association to be used in getting out to its members any information it wanted to get out to them. It would deal with this very thing Judge Smith has been talking about here, the annotation of this re-statement of the law by the American Law Institute; so that the members of the Bar of the State would be interested in the matters that would be coming out in this journal gotten out by the Association and by the Law School.

Now, in addition to that, in this journal would be published matters with reference to members of the Bar —eminent things that might be done by members of the Bar, the record of deaths of prominent members of the Association, and other matters that might be generally of interest to the Bar in the State of Mississippi.

Now, in addition to that, this journal would contain articles from prominent men of the Bar of the State; also articles coming from students in the Law School that might be of interest to the Bar.

At times, members of the Bar might think the Supreme Court had gone off on the wrong foot on some decision they had made here; it would be a medium or forum where these matters could be developed and the attention of the Supreme Court called to the fact that they had made grievous error in deciding a certain case, and maybe get a reconsideration. They say it is right hard at times to get re-consideration. The publication will be within the means we have, or will have in hand, to get it out.

MR. W. B. MIXON: Would the students tell the lawyers of the State what they ought to do? That's going to be done by the students of the University of Mississippi?

JUDGE T. C. KIMBROUGH: No. sir; the students

tell about a good many things up there, and about the time they graduate they have a good big idea about what they know about the law, but I do not think they would undertake to do this.

I want to say this to the gentlemen who asked the question: This very thing is being done by other bar associations; it is not anything new we are suggesting here. For instance, the Minnesota Bar Association does this very thing in co-operation with the School of Law of that State. I want to say this also: That there is not scarcely a law school in the whole country, a state law school, that does not get out a journal of this kind. I want to say this further: That a great many of these journals, the articles written in these journals, and some of them written by students, are cited by the supreme courts of this country. You take the Harvard Law Review; you take the Yale Law Review; the Michigan Law Review, you will find time after time in the supreme court of the states and the Supreme Court of the United States that they cite those articles as being authority.

So, it is nothing new that I am talking about here, but it is a thing the law school of this State ought to have; and we want the co-operation of the Bar, because we cannot do this very well unless we can get the co-operation and interest of the Bar in this enterprise. I think the Bar of the State ought to be interested; I think they are interested, in the State Law School, and what it is trying to do, and here is the thing they ought to do. We have some very capable young men in the Law School, and here is a field where they can show their ability; here is a field where the lawyers of the State can write articles, and get them out to the members of the profession in the State; and I think it would be an eminently wise, and proper, and helpful thing if the Association will co-operate in trying to get this journal out. I think it can be done, if we can get the co-operation, and sympathy, and help of the Bar and the Association in this project. So, I hope the Association will be patient in this matter, and not treat it lightly, but give it the consideration that it deserves at your hands. I submit that matter for your consideration.

MR. R. M. KELLY: What would you suggest as to what action we should take?

JUDGE T. C. KIMBROUGH: That will be suggested as to what will be done. I am simply getting the matter

before the Association, and possibly someone will want to make a motion with reference to the matter.

PRESIDENT WILBOURN: Gentlemen, you have heard the statement of Judge Kimbrough with reference to this matter. Possibly you may recall that some reference was made to it in the President's address, and the suggestion strikes me as being one that would be of great help to the Bar and Law School, and the State at large. It seems also to gibe with the remarks of Judge Smith, and would furnish some medium through which we could work out a plan for publication of the annotated re-statements of the American Law Institute.

Now, what will be the pleasure of the Association with reference to this matter? Do I hear any resolution or motion suggested

MR. J. M. THOMAS: Mr. President, on yesterday at a meeting of the Executive Committee this matter was discussed, and Judge Kimbrough was kind enough to come before the Committee and have some extended discussion over the suggestions that you were to make in your address, and at that time we came to the conclusion that the idea was a very good one and should be carried out. We were not exactly clear as to the exact method, but we felt that the Executive Committee of the State Bar Association would be ex-officio members of the Committee to serve in conjunction with Dean Kimbrough of the Law School, who would be Chairman of that Committee that would have charge of this publication, and that this Bar Association would commit itself to the proposition of joining in with the publication of this book quarterly under a subscription to be put to the Bar of the State probably at $1.50 per annum, or possibly $2.00, whatever might be determined by the Committee; and that this Bar Association should go on record now as favoring that plan, and have its annual proceedings published in one of the quarterly numbers and use it as a magazine to the Bar; and to that end I make that motion, and that the President of the Bar Association and the Secretary would be ex-officio members of that Committee.

MR. GABE JACOBSON: I second that motion.

MR. W. W. MAGRUDER: Just briefly, I take pleasure in endorsing the suggestion of my friend, Judge Kimbrough, and also the motion made by Mr. Thomas, both of which are in line with the thought suggested in your address to the Association. We certainly ought to have some

kind of a law journal, or law magazine, in this State; and we have not a very large Bar; we have no great cities in our State; and we have had in the past a considerable task or difficulty in maintaining a creditable law journal in our State; but it seems under this plan we can do so. There is a bunch of bright boys up there every session who can, under the supervision of Judge Kimbrough and his associates, do excellent work. A busy lawyer has not the time to do that work; none of us here would undertake a work of that kind and do with any degree of proficiency; but you get a bunch of six or ten of those young fellows at the University, they can do it to most excellent advantage, under the supervision of men like Judge Kimbrough, and they should have good articles on construction and analysis of our statutes and decisions of the Supreme Court of our State, and the United States, and the various fields that are usually covered by a law journal. It can be handled in that way better than in any other way, about four issues a year. The ordinary expense of the publication of our work here would take care of one issue, and there is not any doubt about being able to take care of the other three issues properly through co-operation at the University, and particularly through the interest that would be aroused in the law department and the general subscription by the lawyers over the State. I take pleasure in endorsing and advocating the passage of Mr. Thomas' motion.

MR. J. M. THOMAS: Mr. President: May I add, with permission of the gentleman who seconded the motion—add to the resolution or motion that the proceedings of this meeting be published in that as the beginning, and that the expense that would usually go to it would work right on and merge into that publication.

MR. GABE JACOBSON: I second the motion.

PRESIDENT WILBOURN: You have all heard the motion. Are you ready to vote? All in favor of the motion will say AYE; all opposed will say NO. The motion is carried.

We will now have the report of the Secretary and Treasurer.

ANNUAL REPORT OF SECRETARY-TREASURER—1928 MEETING

To the Mississippi State Bar Association:

Your Secretary begs to submit the following report:

On January 25th, 1928, Hon. J. T. Brown, submitted his resignation to your Executive Committee, which resignation was accepted. Following the resignation of Mr. Brown, the Executive Committee elected the present Secretary.

MR. BROWN'S REPORT DATED JANUARY 25, 1928, FOLLOWS:

Report of J. T. Brown, Secretary-Treasurer, as of January 25, 1928.

RECEIPTS

Balance cash on hand from last report June 10, 1927	$1,853.10
Dues collected since last report, including banquet tickets sold	461.00
	$2,314.10

DISBURSEMENTS

J. L. Albritton for 1927 Ole Miss Medal	$ 25.00
Tucker Printing House, 1927 Program	25.65
Stamps on Annual, etc.	30.00
R. S. Streit reporting 1927 meeting	135.00
Jackson Printing Company, stationery	23.75
Tucker Printing House, 1927 Annuals	518.30
Tucker Printing House, additional Annuals	21.24
Edwards House, 1927 Banquet	450.00
J. T. Brown, balance salary	300.00
Balance cash on hand	785.16
	$2,314.10

All the bills of the Association are paid in full and so far as I know there are no outstanding obligations of any kind. No dues for 1928 have been collected by me and the balance of $785.16 shown above therefore represents the actual amount of cash on hand from last year after all bills were paid.

I, the undersigned J. T. Brown, do hereby certify that the above and foregoing report is correct, this January 25, 1928.

J. T. BROWN,
Retiring Secretary-Treasurer.

Received of J. T. Brown the sum of $785.16 above referred to, together with all the files and records of the Association, this the 6th day of February, 1928.

LOUIS M. JIGGITTS,
Incoming Secretary-Treasurer.

Your Secretary submits the following report:

RECEIPTS

Balance on hand (received from Mr. Brown, the retiring Secretary)	$ 785.16
Dues collected since date of Mr. Brown's report to April 26, 1928	885.00
	$1,670.16

DISBURSEMENTS

Stamps for sending notices, etc.	$ 26.00
Multigraphing letters	8.00
Premium on Secretary-Treasurer's Bond	10.00
Membership Cards	9.25
Balance on hand (as of April 26, 1928)	1,616.91
	$1,670.16

I, Louis M. Jiggitts, Secretary-Treasurer, do hereby certify that the above report is true and correct. This the 1st day of May, 1928.

LOUIS M. JIGGITTS,
Secretary-Treasurer.

Approved:

R. E. WILBOURN,
President.

PRESIDENT WILBOURN: Gentlemen, you have

heard the report of the Secretary-Treasurer. What action will you take on it?

MR. GEORGE BUTLER: I move it be received.

MR. T. C. KIMBROUGH: I second the motion.

PRESIDENT WILBOURN: Is there any discussion? All in favor of the motion will let it be known by saying AYE; opposed NO. The motion is carried, and the report is received.

MR. J. M. THOMAS: Mr. President: Just on that matter, I feel before we go into something else, in view of the services rendered to this Association by Mr. Brown for a long time, and so faithfully, and with so much work attached to it, and he reflected so much credit on this Association in the Secretary's work, I feel that we should pass a resolution of thanks for his long and faithful services.

MR. L. M. JIGGITTS: I second that motion.

PRESIDENT WILBOURN: Will you express that and give it to the Secretary? We will adopt it now; but you write it out and word it.

MR. J. M. THOMAS: Yes, sir.

PRESIDENT WILBOURN: All in favor of that motion will let it be known by saying AYE; all opposed NO. The motion is carried, and Mr. Thomas will frame the resolution.

The following Resolution was introduced by J. M. Thomas and upon his motion and duly seconded the same was unanimously adopted:

Resolved, that this Association, recognizing the long, continuous and faithful service of the Hon. J. T. Brown, as Secretary and Treasurer of our Association, regret his resignation, and extend to him the gratitude and expression of the keen appreciation felt by the members for his most efficient service and devotion to the Association work and activities, and that he be furnished with a copy of this resolution.

JUDGE SYDNEY SMITH: May I make a suggestion to you? The committee contemplated by the resolution of Mr. Butler with reference to annotation of these re-statements, should not that committee be appointed as early as possible, so they can have a conference? And I want to suggest, if there is no objection to it, that the present President make the appointment so that the committee can commence to have that conference, and commence as early as possible; and I make the suggestion, if there be no objection, that the President appoint that committee during the day.

MR. A. T. STOVALL: Consider that a motion, and I will second it.

PRESIDENT WILBOURN: All in favor of that will say AYE; all opposed NO. I will announce that appoint-

ment during the morning session, so that the members who may be appointed can get together here at this convention, lay their plans, and the work can go on more speedily, in accordance with Judge Smith's suggestion.

Judge Houston, I would like to recognize you for the purpose of making a report on that special committee with reference to the University Law School.

JUDGE D. W. HOUSTON: Mr. President: with your permission will keep my place here. It will be brief.

To the President and Members of the Mississippi State Bar Association:

Your committee appointed to try to secure proper appropriation by the Legislature for the construction of a new Law School Building at the University of Mississippi, and proper equipment therefor, beg leave to report that in November, 1927, they met together at the University, organized and thoroughly investigated the need of this improvement, and outlined plans for securing an appropriation of $150,000.00 for this purpose.

Afterwards, in January, 1928, two of the members of said committee appeared before the Appropriation Committee of the Legislature, and urged that said appropriation be made.

Without going into further details, we are pleased to report that the Legislature made the appropriation asked for.

Respectfully submitted,

D. W. HOUSTON, Chairman,
STONE DEAVOURS,
W. W. VENABLE,
WALL DOXEY,
J. H. CURRIE,
A. J. McINTYRE,
J. H. PRICE,
E. O. SYKES.

PRESIDENT WILBOURN: You have heard the report of the Committee on University Law School. What is the pleasure of the Association?

MR. W. CALVIN WELLS: I would like to hear from Judge Kimbrough as to what plans they have to spend that. We have the greatest improvement we have ever had in the history of our law school; we have the largest appropriation; and I would like to hear from Judge Kimbrough.

JUDGE T. C. KIMBROUGH: I want to say this: I want to commend that Committee on University Law School; I never knew of a committee of the Bar Association that did more diligent and more effective work, and that spent more time on it than they did, and a large number on that committee, and I think this Association ought to go on record in thanking them for their services.

PRESIDENT WILBOURN: Judge Kimbrough, tell us briefly what you are going to do about the Law School.

JUDGE T. C. KIMBROUGH: I take very great pleasure in responding to this request. I want to say that I have never seen or known of better work than was done by this

Committee appointed by your Bar Association. They went to the University at their own expense, made the investigations there, got the matter before the legislature, got the legislature interested in it, and got the appropriation put over for exactly the amount they had asked, $150,000.00. Now, as a representative of the University here, I want to thank this Committee for the splendid work they did, and not only the Committee, but I want to thank the entire Bar Association for the splendid spirit of sympathy and co-operation that they exhibited in this matter. A great many members of the Bar whom I could personally name now wrote letters, made visits, phoned, and wired people when the matter was coming up before the legislature insisting, asking and urging that we be given $150,000.00 up there for a law school. It is one of the greatest things that has happened to the University in its history, the appropriation that has recently been made by the legislature of $1,600,000.00. It amounts to more than has ever been appropriated all told up to this time before for permanent improvements at the University. As a matter of fact, it has put the University of Mississippi on the map as a university.

Now, as to the Law School, more especially, it was a matter that made us hang our heads in somewhat shame that we did not have better facilities there. With the $150,000.00 which we have obtained from the legislature, through your very generous aid and help, we will be able to construct a law building the equal of any in the South, any state law building, save the University of Texas and the University of Virginia; the two law buildings there possibly have more money invested in them—the University of Texas $300,000.00 and the University of Virginia something like $200,000.00. But outside of those two we will have as good a law building as in the South. It will be modern, and equipped in every way, so that your sons when they go to study law will have all the equipment and facilities that any other young man in any other state in the South will have.

MR. W. B. MIXON: They will have the building; what provision have you got for a library up there?

JUDGE T. C. KIMBROUGH: Yes, I will touch on that. We have in our library, responding to the question, something like five or six thousand volumes. We purchased in the spring $4,000.00 more in books, making somewhere between one and two thousand more volumes in the library.

I think we will have sufficient money out of this appropriation to put $10,000.00 more into the library. I think we can put up the building and equip it for $140,0000.00, and $10,000.00 can then be used in the purchase of additional books; that will give us a library then, not equal to any in the South, but it will give us a good substantial working library that will meet all the requirements of the American Bar Association, and all of the requirements of the Association of American Law Schools. You will remember that the trouble we had heretofore was that we didn't have sufficient equipment as to the building itself, and sufficient equipment as to the library. Now we will go far beyond what the American Bar Association is requiring and and what the Association of American Law Schools is requiring; and sometime next session I am sure you will see announced that the University of Mississippi Law School comes back into the Association of American Law Schools —there will not be any question about that—as an A-grade law school, all of this brought about by this Bar Association.

I want to say this in concluding too, to let you know how we feel about it. In talking to the Chancellor the day before I came down here, he said: "I wish you would state to the Bar Association when you get down there, that the University of Mississippi not only thanks them for their interest in the appropriation for the Law School, but the Chancellor and the University desire to thank that body for their general interest in the appropriation for the University at large."

You have made us immensely happy up there at the University. We will have the equipment now so that our University will rank with practically any other university in the South.

Now, before I take my seat, I want to say this: I want to forestall what this Bar Association may do two years from now. In 1930 all of these new buildings will be completed; the Law Building will be completed; and I want to say to you now that I am extending to you an invitation to hold your meeting two years from now at the University of Mississippi in the new Law Building, and I am asking that for that occasion a program be worked out by which this Bar Association will dedicate the new Law Building. I have discussed this matter with the Chancellor, and he said tell the Bar Association to come on; the University and the town of Oxford will take care of you when you come there,

and I believe all the members of this Association interested in the Law School and University will be glad to meet there on that occasion, inspect the buildings, and see what we have; so, I am extending to you now this invitation. (Applause.)

MR. W. CALVIN WELLS: I want to move that a vote of thanks to this Committee who have done this wonderful work. I would like for their names to be called—men who will quit their business, at their own expense, and go through and make this magnificient effort, which has been crowned with success and which, in my judgment, is one of the greatest pieces of constructive work that has ever been done by the Bar Association. I make the motion that a vote of thanks be given them, and ask that the roll call of this Committee be made.

MR. JOHN A. YEAGER: May I humbly beg to add the name of Judge Kimbrough to that list, because of all the diplomacy that has ever been displayed, even in dealing with the great nations of the earth, none have equalled, and I am sure none have excelled, that displayed by Judge Kimbrough in handling and whipping we boys into line.

PRESIDENT WILBOURN: I am sure if you will second the motion Mr. Wells will join you. Do you second Mr. Well's motion?

MR. JOHN A. YEAGER: Yes, sir.

JUDGE D. M. RUSSELL: I would like to suggest that it be by a rising vote.

PRESIDENT WILBOURN: Let's see if we can call the names of the committee. These are the names: Hon. D. W. Houston, Chairman; Hon. Stone Deavours, Hon. W. W. Venable, Hon. Wall Doxey, Hon. J. H. Currie, Hon. A. J. McIntyre, Hon. J. H. Price, Hon. E. O. Sykes.

MR. W. CALVIN WELLS: I see the name of the President of our Association is not on there. I know the work he did, and with unanimous consent, I want Mr. Wilbourn's name added to that vote of thanks.

JUDGE T. C. KIMBROUGH: I want to say to the Association too that the President of this Association spent his time and money and his energy in trying to bring this thing to pass, and I think he ought to be included in this vote of thanks.

MR. GABE JACOBSON: I second the motion.

PRESIDENT WILBOURN: All in favor of the motion made, and as variously amended, let it be known by standing; the motion is unanimously adopted and carried.

We are about to reach a very interesting stage in our program, gentlemen. In a very few minutes we will have the annual address. Before we get to that, however, I want to recognize Mr. Thomas. I think he has something in mind now.

MR. J. M. THOMAS: I called the Secretary with reference to the report he made a moment ago. It has been called to the attention of the Executive Committee that there are a number of the membership who have been in arrears in their dues for a number of years, possibly under the impression that they were no longer members, and the construction that has been placed upon the By-Laws of the Association by the Secretary and Treasurer has been that before they are re-instated that all of the past dues for a number of years have to be paid, and it is the suggestion of the Executive Committee that the Secretary and Treasurer be authorized to abate all past dues with the exception of two years, and ask for the Association to give that authority, and to that extent I make this motion.

MR. GABE JACOBSON: I second the motion.

PRESIDENT WILBOURN: We are all pretty generally in favor of the Abatement Act, and I do not suppose we care to discuss it much. All in favor of the motion made by Mr. Thomas will say AYE; opposed NO. The motion is carried.

Now, gentlemen, let us get rid of a few other little matters we have. We had a special committee on yesterday on making some suggestion with reference to the Code Commission.

JUDGE T. C. KIMBROUGH: Mr. President: The report of your Committee, composed of myself, Mr. Magruder and Mr. Dulaney, beg to make this report:

We have had a conference with Judge Griffith, one of the Code Commissioners, but have been unable to get in conference with the other commissioners, because of the fact they are not here. By reason of this fact, we have not been able to go into this matter very fully; but we have decided to make this report: That the Association, through its President, appoint a committee of five, one from each Supreme Court District in the State, and two from the State at large, this committee of five being empowered to act for the Association in co-operating with the three Code Commissioners in their effort to properly do their work, this committee of five to be composed of distinguished lawyers of the State, who will meet with the Code Commis-

sioners at some convenient point, and then work out what they deem to be the necessary machinery in assisting the Code Commissioners in doing their work properly.

PRESIDENT WILBOURN: What shall we do with the report?

MR. JOHN A. YEAGER: I move that the report be adopted.

MR. GABE JACOBSON: I second the motion.

PRESIDENT WILBOURN: All in favor of the motion will say AYE; opposed NO. The motion is carried and the report adopted; and I take it the incoming President will properly name that committee. I was directed by vote of the Association a little while ago to name this committee that was to be selected to look after the annotations of the re-statements of the law made by the American Law Institute, so that they might get busy during this session and start something. I have decided to appoint on that committee Judge Kimbrough, Mr. Butler and Mr. Thomas. I believe three were to be named. All of them are here, and they will have an opportunity before they separate to meet and lay their plans for that work.

MR. J. M. THOMAS: I have a regular committee report. I do not know whether you want to hear it.

PRESIDENT WILBOURN: We had better take that up after we hear the Annual Address. There are one or two other reports to be taken up; and we have reached the time when we will be favored with the Annual Address. I will ask Hon. A. B. Amis, of the Meridian Bar, to come forward and escort the speaker to the stand. Also, may I request that everbody in the rear come forward and get seats. There are plenty of chairs here, and let us all get our seats before the address begins.

We are very happy this year, my friends, in having a graduate of the law class of "Ole Miss" of the year 1892 with us. It seemed to me to be an exceedingly fitting thing that he should be introduced by one of his classmates we have with us, who has agreed to perform that pleasant function, Hon. A. B. Amis, of the Meridian Bar, who was a classmate of Mr. Ames, who is known to all of you gentlemen as one of the distinguished and honorable lawyers of our State—Hon. A. B. Amis, of the Meridian Bar.

MR. A. B. AMIS: Gentlemen of the Bar Association: When I call to mind the great number of Mississippi-bred lawyers who have gone forth from our borders to other states and there attained to distinction and eminence, I

am caused to wonder whether or not it is due to the fact that only the more able spirits are bold enough to go forth from the home nest to find for themselves fame and fortune in foreign lands, or perchance whether it is due to the fact—which I am sure you gentlemen here will accept without requiring proof—that the Mississippi-bred lawyer, wherever you find him, is just a little bit better lawyer than you will find anywhere else on earth. (Applause.)

And if the latter be true reasoning, then I am led further to wonder whether it be due to the fact of our equitable climate, whether it be due to the fact that in our veins runs some of the best blood in the world, and that we were sired by great ancestors, or whether perhaps it is due to the fact that the grazing is so short in Mississippi, the fees are so small in the average cases, that we have got to fight every case like tigers to keep the wolf from the door. But be that as it may, there is one that we have here with us today, our distinguished guest, who is a native son of Mississippi, born and reared in the good old county of Noxubee, educated at Mary and Henry College in 1890, graduated from the University of Mississippi in 1892 in a class containing just thirteen members; who after that went to Macon, and there practiced some law and a good deal of oratory before Squire Dorman, J. P., and other lesser courts; and after he had received proper training in those courts concluded that there were greener pastures elsewhere, and went out to Oklahoma to grow up with the country; and there, true to the tradition of the Mississippi lawyer, he at once began to take his place and to rise to eminence in his profession, and to popularity among his people.

There he, as I understand, took a large part in framing the Constitution of Oklahoma. Later, he served for a time as one of the Supreme Court Commissioners, as Presiding Justice of Division One, for about two years.

Later, he served as Assistant Attorney General of the United States under the Wilson administration, and now is engaged in the practice of law in Oklahoma.

He has been President of the Oklahoma Bar Association, and my information is that he is one of the outstanding members of the Bar of Oklahoma—a man that has gone to the front, whose ability and whose efforts have been recognized; a man who has attained eminence; but, I am sure that he will agree with me, not least among his achievements is the fact that he has reared a large family of worthy sons and daughters who in his declining years, as the shadows

grow longer and longer along life's pathway, will be a comfort and solace to him as he approaches that time when we all will lay down the burdens of life.

Gentlemen, it gives me great pleasure to now present to you my old-time friend and class mate, Judge Charles B. Ames, of Oklahoma. (Continued applause.)

JUDGE CHARLES B. AMES: Mr. President, Mr. Amis, Ladies and Gentlemen: When I had an invitation from the President of your Association to deliver this address, I accepted it immediately. Although I think I was quite selfish in doing it, I accepted it in order that I might have the pleasure of attending the meeting, and meeting my old friends and making new ones, although I had scant time for preparation for the occasion. As a matter of fact, I have only been at home three days since I had the invitation. But I could not resist the opportunity of coming back home.

My friend Amis is quite correct in saying that I practiced oratory before a justice of the peace in Macon, and that is the last oratory I practiced. I thought at that time I was an orator. but I have long since given up that notion, and I have concluded that of orators I am not one, although they are most delightful lawyers.

It has been about eight years since I was in Mississippi last, and I have spent the last two or three days visiting my relatives and friends in other parts of the State, and have come here for the last stop on this journey.

What to talk about at a meeting of this kind is always the most difficult thing about it. Where you once decide what your subject is, you can always say something. It may not be something that anybody else will agree with, but that is a part of the duty resting upon the speaker.

But before I get to that subject, I want to say how much interested I have been in hearing of the progress that is being made at the University, and what fine work Judge Kimbrough is doing for his law school, and the assistance he is getting from the Bar Association. But I have an idea that all records were broken at the University Law School by some members of the class in which I graduated. I think ordinarily, Judge, the best a man can do in your class is to get a hundred. Well, that record was broken by my friend Amis and my friend Stone Deavours, in the class in which I graduated. There were two or three members of that class that got a general average of over a hundred. They are still super-perfect lawyers. It came about in this way: That class was the first one that Judge Whitfield taught. He succeeded Edward Mayes during the middle of the year, and in his first examination he had an idea that the boys of that class knew a great deal more law than they actually did, so he gave an examination on that theory, and he flunked about two-thirds of the class. He did not want to do that, and the class did not want it

done, and the faculty did not want it done, and it seemed a pity to break up that magic number of thirteen anyway; so, he settled the problem by adding enough to the grade of each man to bring the lowest one up to the passing mark, and when that was done Amis and Deavours had more than a hundred. (Laughter.)

I have selected a new subject to talk about today, and one you will be surprised at when you hear me announce it—the "Constitution of the United States". I thought you would be surprised. But I really am going to talk about a phase of the Constitution that has not been discussed very much; in fact, I am not sure that I have heard it discussed at all. I think, possibly, I have an original idea on that subject, and that is, the effect of war on our Constitution.

Now, the fundamental notion of the framers of our Constitution was to so distribute the powers of government as to protect the people against oppression by any group of public officers, while the fundamental necessity of war is to so concentrate the powers of government that the Nation may act as a unit. Those opposing principles, and their re-action upon each other, is a rather interesting subject of thought.

The Constitution of the United States as it was, and as it is, as a matter of fact, is the result of the times in which it was framed. It has been praised by Gladstone as the greatest work of the brain of man that was ever struck off at a given time; and a few generations ago it was criticised by some good people in this country as a league with death and a covenant with hell. But neither is true. It is just the normal expression of the views of the time, and what the people regard as necessities. And it has always had a re-action from present conditions. For instance, when it was drafted originally, Europe was divided into five or six powerful countries, where absolutism prevailed. The House of Hanover in England; Bourbon in France; the Hapsburgs and Hohenzollerns, and the Romanoffs in Prussia, were dictators that controlled their people, and there was nothing approaching popular government, except a little in England, and that was not a great deal. But that was the condition in Europe which brought about our revolution, and from which we re-acted, the result being our Articles of Confederation, which did not give the general government enough power to function, but left it all in the thirteen Colonies. And when we achieved our independence his Britannic Majesty recognized the Thirteen Colonies as thirteen independent states. They were bound together in a loose knot of friendship by the Articles of Confederation, and bound so loosely that the government, as such, could not function; and the result of its inability to function brought about the meeting of the Constitutional Convention and the adoption of the Constitution. But still, the fear of concentrated power was the most powerful influence in that day; and, as I stated a moment ago, the men who framed the Constitution were diligent in so distributing the powers of government that no one could oppress the

people. The powers granted were divided into the three great departments of government; but the greatest check was the system by which they declared in one of the first ten amendments, which were contemporaneous with the adoption of the Constitution, that all the powers not granted to the general government were reserved to the respective states, or their people. Our forefathers looked upon the Constitution at that time as a purely voluntary matter; in fact, it was provided in the Constitution itself that it should become effective when nine of the states should ratify it, and it should become effective as between the nine so ratifying; as to any others that did not ratify, they were not part of the Union, and at least one state stayed out for two years. I heard this morning for the first time the reason why; it was at the breakfast table; one of the lawyers present quoted Judge Whitfield as giving the reason why Rhode Island refused to ratify the Constitution for two years, and that was because they were Baptists. (Applause.) Baptists like to think for themselves, and act for themselves; therefore, they did not want to join the Union. But that notion of perfect liberty to come in or stay out, as they liked, was the dominant note of the day; and after they all came in they all felt they had a perfect right to go out whenever they chose, and that was the sentiment, north, south and everywhere, there was no material difference of opinion in the minds of the people of that day as to the right of any state which had made itself a party to this contract to terminate it by terminating the partnership, so far as it was concerned; and that sentiment began to change as new states were admitted and as the country developed, and as our commerce became a unit, and the country more and more of a unified country, transportation, building of roads, shipping of goods, collecting of debts, the national banking system, all of those things tended to break down the notion of separatist ideas, and to build up the notion of a permanent Union, not subject to alteration under any circumstances.

And as a result of those changing economic conditions we had the Civil War. It took the arbitrament of the sword to decide the question as to whether the economic conditions of our life had changed the Constitution so no state had the right to go out, and it has so happened that our Constitution even today has always more or less reflected changing public opinion, and that is because it has dealt with broad general principles in the main, and has stayed away from details which should be left to legislative action.

We come, then, to the Civil War period when, for the first time, the question of secession was settled, and we note in the amendments to the Constitution, adopted as a result of the Civil War, the vital change in the manner of thinking about our Constitution. The natural re-action from the notion of separatist movement, what we call secession, was the opposite. The pendulum swings from one end to the other, and the pendulum was swing ng from the separatist idea to the permanent Union idea,

and naturally, of course, that was a particularly strong backward swinging, or forward swinging, as you may choose to call it, immediately after the Civil War was over.

Now, during the War, naturally, all of the powers of government had been concentrated in Washington. The then chief business of the North during that time was to whip the South, and the chief business of the South was to keep the North from whipping it, and the result was that all of the powers of government on the northern side of the line were practically conferred upon Washington. At first both sides tried to fight the war as much as possible retaining the separate state idea, calling for quotas and calling for volunteers; but on both sides of the line after a reasonable time that idea was abandoned, and the North and South both passed conscription laws. So, we came to the end of the war with that notion, here was a war brought about by constitutional idea that a state had a right to withdraw from the Union, and the result was the reverse of that idea, and the diminution to the zero point of the state's rights.

Now, naturally it followed as a result of the war that the Thirteenth Amendment should be adopted and slavery should cease as an institution in this country. Whether they should have gone any farther than that is a matter about which there may be difference of opinion today. Abraham Lincoln had no doubt about it; he thought that was as far as it should go, and he thought and stated in confidential letters that he would like to see the southern states experiment with negro suffrage, giving suffrage to those who had accumulated some property, but leave it entirely to the will of each state whether it should be. Lincoln passed out of the picture, and when he did the greatest blow that could have happened to the South was struck. Although Andrew Johnson did his best to carry out Lincoln's policies, he did not have the confidence of his party or the country, and he was unable to do it.

Now, the steps in bringing about the Fourteenth and the Fifteenth Amendments very well illustrate that re-action brought about by the war. When the war ended the southern states, of course, were organized as states; they were functioning as those in the North, and they immediately set about resuming their relation to the general government. The legislature was called into session by each of the southern states by the Governors, and about that time Johnson, in carrying out Lincoln's policies, appointed a temporary governor, and instructed those appointees of his to call conventions of the loyal people of the state for the purpose of taking appropriate action. That was done promptly by Mississippi and the other states in 1865, and senators and representatives were elected and sent to Washington, and Congress convened in December, 1865. They did not admit those representatives of the southern states, appointed a committee to consider the matter and 1866 was a campaign year and feeling

ran high, and the result was the election of a more hostile congress than had existed while the war itself was in session. And when that congress convened they still did not admit those senators and representatives, but did pass the re-Construction Act in 1867, in March; by the terms of that Act the Fourteenth Amendment had also been passed without representation of southern states in congress at all. By the terms of this re-construction Act the suffrage was conferred upon the negro in the southern states, although Kentucky, Ohio, Minnesota and Kansas had voted against negro suffrage during that period. A military general was appointed to take charge of the military districts into which the South was divided, and they were directed to hold conventions, and delegates to those conventions were to be elected as the result of negro suffrage by Congress, and most of the white people were disfranchised because of their connection with the War. So, as a result of this election, in which the negro participated, legislatures were elected, and Congress provided that their senators and representatives—these senators and representatives chosen by those legislatures—should be seated when they had ratified the Fourteenth Amendment; so, they at once ratified the Fourteenth Amendment, with the exception, I believe, of Virginia, Mississippi and Texas. Then Congress proposed the Fifteenth Amendment, granting suffrage, irrespective of race, color, or previous conditions of servitude, and this amendment was proclaimed when twenty-nine states had ratified it; twenty-seven were necessary. Of the twenty-nine, nine of them were southern states, Virginia, North and South Carolina, Florida, Alabama, Mississippi, Arkansas and Texas, so that it required seven of those states to complete ratification of the Fifteenth Amendment. Therefore, the Fifteenth Amendment was adopted granting negro suffrage by reason of negro suffrage already granted by Congress. And what was the result? Obviously, the suffrage was purely a state question. There was a complete departure from the original notion of leaving all local questions solely to local decision. We had throughout the South a period in our history that we could well wish had never been, and that it might be forgotten. In Mississippi, for instance, during the five years, the taxes increased fourteen hundred per cent; six and a half million acres of land were sold for taxes; in Alabama the public debt was raised five hundred per cent; in North Carolina, in four months, that legislature voted $25,000,000 in aid of railroads and other projects which they never got; in South Carolina, that legislature maintained a restaurant, at which not only free meals, but free wines and free cigars, were served to the members of the legislature and their friends; and that illustrates the story.

Now, with that impoverished condition forced upon the white people of the South, and with them practically disfranchised, the result was obvious, and that was to solidify the white race; the black race was already solidified by the regime that brought it into being, and the white race was necessarily solidified in order

to preserve itself. Now, there is no reason other than that why the white people of the South should think alike politically any more than they should think alike in any other section of the country. They did not before the Civil War. Clay and Calhoun, for instance, were two of the great leaders in opposition to Andrew Jackson, and all of them were southern men. There was never a time in the South prior to the War when there was a united white race, and there is no reason for it now, except this occupation of the state's rights by the Fifteenth Amendment.

The next consequence of the Fifteenth Amendment that is noticeable is that here in Mississippi you do not propose to have it enforced. You have gotten rid of the negro vote in the main by one means and another, lawful where possible, but you have gotten rid of it, and you are not going to have the negro vote if you can help it.

Now, there are some ominous signs on the horizon about this question today. You are educating him; he is being educated all over the South; he is coming more and more to know something about the effect of the suffrage. The most intelligent ones are indifferent about it; they think it is a great mistake for the negro to come back into politics; but all of the intelligent ones are not unselfish. For instance, we have all noticed in the last day that an Alabama negro has been nominated for Congress in a Chicago district, which was represented for years by Martin B. Meeks, one of the ablest representatives in the House, and four-fifths of the people in that district are colored. I notice by the papers in Mississippi, in the last day or two, there seems to be some controversy in the State as to whether a white man or a black man shall control Federal patronage here. There are some ominous signs on the horizon. How long the present situation can be maintained with satisfaction to both races is a problem.

Now, I don't know—I don't believe there is a man or woman in this audience who would think for a moment that the Fifteenth Amendment should be enforced. There has not been a force bill introduced in Congress since Henry Cabot Lodge was a member of the House of Represenatives. You do not respect the Fifteenth Amendment, and you do not intend to have it enforced, and the people of the United States at this writing do not intend themselves to force it on you by congressional legislation; so that we have an amendment to the Constitution of the United States, a part of our organic law, which ought to command the respect of all good citizens, which does not command the respect of the religious, law-abiding, property owning, intelligent people of the South. Why? Because it was a war amendment. It constituted a radical departure from the theory of our constitution.

Now, we come to the last war, and we find the same thing in principle, the same fundamental idea obtaining, only in the last war it began to obtain immediately; we never took any time fooling with the question of state's rights during the last war;

everything was turned into the lap of the Government immediately, instead of waiting until the volunteer system had proven a failure; Congress immediately passed the conscription law, which they sugar-coated by the name of "Selective Service Law"; and not only that, but men and women of the country enlisted almost without exception somewhere, in one phase or other of war activities, and they did whatever they were asked to do. One of the marvels of the age was to see the American people comply with the request of the Food Administration. I happened to be Food Administrator for Oklahoma, and ninety per cent of the people, if not a hundred per cent, at once, whenever they made a request, complied with it; they would stop eating wheat in order that Europe might have it; they did anything; they converted their manufacturing plants into war uses, or war industries; the War Industries Board, the Grain Corporation, the Councils of Defense; we at once surrendered everything to Washington, and never raised a question about it. Why? Because that is a fundamental necessity of war; if you are going to win it, you are not going to have time to debate with yourself how you are going to win it; you have to turn it over to somebody and obey orders. That is the war spirit, and it is fine; but it is a question in my mind as to whether the Constitution of the United States ought to be amended when there is a war spirit on, and when we are in the habit of reserving everything to Washington. We find at the very beginning of the war Congress passing and proposing to the States the Eighteenth Amendment, and I believe it was 1916, when the War spirit was on, the Eighteenth Amendment had been proclaimed, that Mississippi was the first state in the Union to ratify the Eighteenth Amendment, although one of its greatest men, Jefferson Davis, was the one who preached state's rights, and who understood the Constitution as few men have done. (Applause). Well, the matter of prohibition, our ancestors would have said, was a matter for each state to determine according to its own interests. Thomas Jefferson, and George Washington, and even Alexander Hamilton and John Marshall, would have said that Mississippi has no right to force prohibition on Wisconsin and they would have said with equal sincerity that Maine has no right to force negro suffrage on Mississippi; they are both, whatever else we may think about it—we may be wet or we may be dry—I am discussing them from a constitutional point of view—whatever else we may say about those two amendments, they are inconsistent with the men who wrote our Constitution that was to keep the states free in all matters affecting local administration. We see the same story with reference to the Eighteenth Amendment that we see with reference to the Fifteenth Amendment, except that the Eighteenth Amendment was not forced upon anybody; no state was required to ratify it; it merely happened at a time when we had forgotten all about the rights of the states and were in the habit of acting as a nation instead of as forty-eight states. But the Eighteenth

Amendment is not enforced any better than the Fifteenth Amendment. Why? It is because local public sentiment does not approve it in some places—it may be enforced one hundred per cent in Mississippi; I don't know about that. (Laughter). It is not enforced a hundred per cent anywhere else I have been.

In Oklahoma, we have had prohibition since 1907, and while we had our state prohibition the law was enforced much better than it is now under national prohibition, because we felt some responsibility for it ourselves, and now the natural disposition out there is to turn it over to Uncle Sam, and let him do it.

Another peculiar and unfortunate effect of the Eighteenth Amendment is that it has obscured issues that are of national importance. For instance, yesterday the Methodist Church of the North in its conference demanded of both parties a bone dry plank in their platforms, and in so doing declared that was the most important issue before America. The matter of taxation, the matter of our international relations, the matter of trade and commerce, fell into insignificance before the issue of prohibition.

Now, stop to analyze that a minute. Why do they call it law enforcement? What is the difference between enforcing the Fifteenth Amendment and the Eighteenth Amendment? I don't hear any of the Southern Methodist Bishops, and I love them, I am one of their flock, I don't hear any Southern Methodist Bishop saying "unless you nominate a man who is going to enforce the Fifteenth Amendment, we will bolt the ticket"; but I do hear them saying "unless you nominate a man who will enforce the Eighteenth Amendment, we will bolt the ticket". What is the difference? If you are going to enforce one, how can you excuse failure to enforce the other? And as the South, which is dry theoretically, is advertised in its effort to enforce the Eighteenth Amendment, you will find a re-action in the North, where there are some wets, saying you will have to enforce the Fifteenth Amendment. I say it is exceedingly unfortunate when that sort of an issue obscures the real issues in a campaign; and yet, strange as it may seem, more folks are going to be controlled by the question of wet or dry this fall than by all the economic issues before the people put together. Why, the Democratic Party is going to forget that the greatest moral issue of the age is Woodrow Wilson's League of Nations, and the foreign policy that he achieved. (Applause.) Instead of standing for that great issue, which affects all mankind throughout all the ages, they are going to vote wet or going to vote dry.

Now, so far I have not said anything that there ought to be any difference of opinion about, I don't care whether you are a prohibitionist or not; I have not said anything so far that every one of you don't know is true, whether you are willing to agree with me or not; and I am going to say another thing, and it is a logical consequence of what I have said, and as I say, all of you will agree with what I have said so far. What is the logical thing to do? You have gotten parts of our Constitution that you

don't like, and I am not sure but that while the South has made wonderful progress since the war, and while it is going forward at a faster rate now than it has ever gone, I am not sure but that there is a cloud the size of a man's hand in the sky, and that the South had just as well begin to think about that Fifteenth Amendment, and what will be the effect of it on your children. You knew what the effect of it was on your fathers when it was enforced. On the other hand, there are a lot of people in this country who will do anything in the world to get rid of the Eighteenth Amendment; they regard it as the worst thing that ever happened; they may be wrong about it—I am not saying whether they are or not; but I do say this, that there has never been a time until today when the South has had a possible chance of getting rid of the Fifteenth Amendment, but that now by combining the opposition to the Fifteenth Amendment in the South with the opposition to the Eighteenth Amendment in the other parts of the country, another amendment to the Constitution might be passed which would repeal them both, and the effect of it would be to leave to each state the power to regulate its own life. (Applause.) It would not deprive the negro of any suffrage in any state where the people wanted him to vote; it would not force the saloon upon any community that does not want the saloon; but it would give to each state the right to regulate its own internal affairs according to its own interests, and it would take away any obligation on the part of the North to force negro suffrage on the South, and it would take away any obligation on the part of any dry community to prevent the wet community from exercising its own judgment about the question.

Now, as I say, I don't know whether any of you agree with my conclusion from the premise I laid down; but it does seem to me that now is the time, and Mississippi is the State to take the lead to right both of these assaults upon the Constitution of the United States. Mississippi was the first state to ratify the Eighteenth Amendment. Even after re-construction was forced upon it, it refused to ratify the Fifteenth Amendment until twenty-seven states had already ratified it and they didn't need Mississippi's vote, and then they did it in order to get its representatives received in Washington. Why should not a state that feels as it does about these two questions, and whose history is such as it is about them both, be the one to take the lead in getting us back to the real foundation of constitutional government in this country? (Continued applause.)

PRESIDENT WILBOURN: Mr. Ames, on behalf of this Association, I desire to thank you, sir, for this very able and thoughtful address with which you have entertained us so delightfully today, and also to express our great gratification that you have been our guest, and have been with us on this occasion.

MR. W. B. MIXON: I move that the Association, by a rising vote, express their thanks for the very able address which has been delivered by the gentleman.

MR. J. M. THOMAS: I second the motion.

PRESIDENT WILBOURN: All in favor of that motion will evidence it by rising. The motion is unanimously carried.

Gentlemen, there is still some important business before the Association to transact. There are some very pleasant activities and entertainment in store for us in the afternoon; but before we can play we must work. We have some things we must accomplish and dispose of before this morning session ends, and we will proceed to accomplish that business as promptly as possible. We have a few reports from some of our committees; it will also be our pleasure and duty to select the place for the next meeting and choose the officers for the next year. It is now my pleasure to recognize Mr. J. M. Thomas as Chairman of the Grievance Committee, who has an interesting report to make to the Association.

MR. J. M. THOMAS: Mr. President: The report of the Grievance Committee is as follows:

REPORT OF GRIEVANCE COMMITTEE

To Mississippi State Bar Association:

The Grievance Committee of the Association, since the last meeting of the Association, has had complaints filed with it against thirty lawyers in this state, the number of complaints however being fifty-seven. We are glad to say that of these complaints only five were against lawyers who are members of this Association.

The large majority of these complaints have been presented through collection or forwarding agencies, and as a rule based upon charges of misappropriation of funds, but in many instances it only developed that the real basis of the complaint was for failure to answer correspondence or other minor derelictions.

In the handling of these complaints, the chairman of the committee has undertaken to get each and every one of them adjusted, regardless as to whether or not the lawyer complained of was a member of the Association.

We are pleased to report that all of said complaints have been satisfactorily disposed of and adjusted with the exception of six—of this number four have only been recently filed and are in the process of adjustment and which we think will only require some correspondence for satisfactory disposition.

The correspondence attached to the handling of these matters has been voluminous, having required the writing of probably 450 to 500 letters, and in one instance a personal trip of investigation. Regardless of the fact that this is a seemingly unnecessary burden to place on the Association, yet it is an important work of the Association, and conducive to the maintenance of confidence in the members of the profession and we feel sure our labors have not been in vain.

As to the two remaining complaints, undisposed of, your committee feels that it would be unwise to report to the Association the details but we feel that the complaints are of serious import and should have our immediate attention.

After consultation with the executive committee of the Association and its unanimous approval your committee recommends to this Association the adoption of a resolution that the president of this Association to be elected at this meeting, appoint at once a special committee, consisting of three members in each case charged with the duty to make immediate investigation and employ such counsel as they may desire to institute and prosecute disbarment proceedings, and handle further as their judgment may dictate.

Respectfully submitted,

J. M. THOMAS, Chairman,
G. J. LEFTWICH,
V. W. GILBERT.

Now, gentlemen, this is a rather serious matter, and you may think it would be unwise for this Association as a body to adopt a resolution of that character to have counsel employed to institute and prosecute disbarment proceedings without the Association knowing more about the details; but your Committee feels that to go into those details would serve no good purpose and it would certainly precipitate and possibly leave impressions upon the members of the Association who are not thoroughly familiar with it that might work a serious injustice to some of the parties.

Your Grievance Committee has consulted with your Executive Committee with regard to these two cases, and this procedure and recommendation that we are making, I can assure you, has the unanimous endorsement of the Executive Committee, and they feel that the report should be adopted, which I will state to you for the reason of the unusual course we are asking you to adopt.

Therefore, I make the motion that this report be adopted, and that these two special committees be appointed, consisting of three members each, whose duty is to employ counsel to institute and prosecute these proceedings as they may deem fit.

MR. A. T. STOVALL: I second the motion.

PRESIDENT WILBOURN: You have heard the report of the Grievance Committee, together with their recommendations, and the motion to adopt that report is before you. Is there any discussion? If not, as many as favor the adoption of the report will say AYE; all opposed NO; the AYES have it, and the motion is carried.

Mr. Secretary, we have one or two other reports to receive, have we not?

SECRETARY JIGGITTS: Yes, sir.

PRESIDENT WILBOURN: We will now call for the Committee on Legal Education. Judge Kimbrough is the Chairman of that Committee.

JUDGE T. C. KIMBROUGH: Mr. President, and Gen-

tlemen of the Association: I wish the burden were placed upon some other member of the Association, or members of the Association, to make this report. A report on Legal Education, coming from the Dean of your Law School, you might say, well, of course he stands for that sort of thing. It might be better if it came from some of the laymen. Nevertheless, your Committee has written into this report just what we think about it, and just what we think ought to be done in order to raise the standard of legal education in this State, that is, established for admission to the Bar. I think it is a matter that this Association ought to give their serious attention and thought to. I do not believe you can afford to pass it over in a light manner, or an indifferent manner. I have found it to be so that in a discussion of this kind, or in a consideration of this kind, the Bar of the State has been disposed to treat it in an indifferent manner. I think the time has come when we ought to give more serious attention to it. The Committee on Legal Education herewith submits the following report:

REPORT OF COMMITTEE ON LEGAL EDUCATION

Meeting Mississippi Bar Association—May 2 and 3, 1928

The Committee on Legal Education herewith submits the following report:

The committee after making a study of the standards and educational requirements of the so-called learned profession in this and other states, together with the standards fixed in other states for admission to the bar, is convinced:

(1) That the educational requirement leading to the practice of other professions, such as engineering, teaching, dentistry, pharmacy, and medicine, is much higher than law.

(2) That the standards for admission to the bar in nearly all of the states and territorial possessions of the United States is much higher than in Mississippi.

(3) That Mississippi does not even approximately meet the requirements for admission to the bar fixed and determined upon by the American Bar Association and the National Conference of Bar Associations of the United States.

To a short review of the foregoing matters we invite your thoughtful attention.

The question that naturally suggests itself to one's mind is, what sound and substantial reason can be given for the existence of such a condition? Is it because of the fact that the other professions are thought to be of greater and more fundamental importance to society than the law?

We do not admit, nor do we believe such a position can reasonably be defended or taken, nor do we believe that it is necessary before this Association to enter into any argument or discussion of this question. It may be taken as admitted, we assume, that this is not the real reason for the low standard of requirements for admission to the bar in this state.

A profession that comes into such close touch with the lives, liberty and property interests of the people of a state, must be of immense importance to the public. The underlying reason for this condition of affairs must be found elsewhere. Maybe it lies in the indifference of the legal profession itself to the situation. Maybe more interest has been manifested by the other

professions in this vital matter. Whatever may be the reason, surely it cannot be argued the existence of such a condition reflects any credit upon the legal profession in this state.

The committee finds the cause of the trouble is not with the requirements of the State's School of Law, the school for years has proceeded upon the idea that adequate requirements for admission to the bar will not only increase the efficiency of those admitted to practice, but will also strengthen the moral character, that it will bring into existence higher ideals of professional duty growing largely out of a proper and just understanding, through study, of the traditions and standards of the bar. In the language of Chief Justice Taft, ''Adequate preparation for the law needs a thorough general education, so that young men may come into it with a substantial foundation. A lawyer must be prepared to take up anything which may be the subject matter of negotiation by his clients or involved in their litigation, and in a short time possess himself of the principles involved, whether of farming, business, science, art, or theology, sufficiently to examine and cross examine witnesses and make the matter clear to the court. This requires a mind thoroughly trained for quickly acquiring and applying knowledge, moreover, the system by which knowledge of the law comes to one through a study of original sources, known as the 'case system', needs a broad educational basis''.

The School of Law, with these things in mind, has adopted a program requiring every student who wishes to enroll, with a few well defined exceptions, to first complete a two year course in a standard college before he will be accepted as a law student. He must then give three years of study to a schedule of law subjects before he will be given a degree.

The basic idea of the schedule adopted being that it tends to greatly increase the efficiency and character of those coming to the practice of law and thereby greatly improves the administration of justice in courts of the state. The program adopted is in line with the standards fixed by the schools of education, engineering, dentistry, pharmacy, and medicine. Let us now turn to a consideration of the legislative requirements of the several professions.

Dentistry

Sec. 4670 of Hemingway's Code provides: A board of dental examiners shall be created to consist of five practicing dentists, who are graduates from a reputable dental school, who shall be appointed by the Governor.

The dental examiners before entering upon the duties of this office shall subscribe to the oath prescribed by the constitution for state officers.

Sec. 4674 provides that in order for the applicant to qualify for the examination for a license to practice dentistry he must be over 21 years old, of good moral character, and a graduate of a reputable dental dispensary or school. It might be said in passing that reputable dental schools over the country require not less than two years of educational work in a standard college and then two years in a college giving scientific training. Any person attempting to practice dentistry in evasion of these statutes is guilty of a crime and upon conviction may be imprisoned or fined.

Pharmacy

Sec. 7417 of Hemingway's Code provides: a board of pharmaceutical examiners shall be appointed by the Governor from a list of twenty names submitted by the Mississippi State Pharmaceutical Association. They must have had not less than five years of practical experience, and in addition, shall be graduates of recognized schools of pharmacy.

Sec. 7414 provides the qualifications of those who are eligible to apply for license to practice pharmacy. ''All persons over 21 years of age, who are graduates of a recognized college or school of pharmacy and of good moral character.''

Sec. 7434 defines a ''recognized college'' as one holding membership in the American Association of Colleges of Pharmacy, etc. The standing of the college at the time of graduation of any student shall govern the eligibility

of such student to take the examination required by the State Board of Pharmacy. The standard associational school of pharmacy now requires five years of work all told. The School of Pharmacy of the University of Mississippi requires two years of work in the School of Liberal Arts, and three additional years of scientific study before a degree will be awarded.

Medicine

Sec. 5509 provides that the State Board of Health shall be composed of regular qualified physicians of the state and members of the State Medical Association. They shall be nominated to the Governor by the State Medical Association and the appointments are to be confirmed by the State Senate.

The statute provides that any person desiring to obtain a license to practice medicine must have the following qualifications: "a diploma from a reputable medical college that requires a four year course of at least 32 weeks for each session".

Two years of pre-medical work and four years in a medical school, or six years student work before one is eligible to stand an examination before the State Board of Medical Examiners.

It is made a crime to attempt to practice medicine without the foregoing statutory requirements.

The Teaching Profession

Those who expect to enter upon a career as teachers in the University and colleges of the state, or in the standard public schools of the state, must possess a college degree. This is not required by statutory enactment, but we may say, not inaptly, it is required by the unwritten law. The same is true of the young men of the state who wish to become civil engineers. They cannot find remunerative and stable employment without first having obtained their degree from a standard college.

From this showing it is manifest, in fact absolutely necessary, in order to practice the profession of dentist, pharmacist, physician, or become a successful civil engineer or teacher, one must first secure the required degree from a standard college. In the first three professions it is made a criminal offense to engage in the profession without license, and a degree is a condition precedent to a license.

The Law

We will now turn our attention to what we lawyers, with expanded chests, speak of as "the greatest of all the professions", "the learned profession", "the profession that is a science"—namely, the law, and examine the statutory requirements. Sec. 10 Hemingway's Code provides: "A state board of law examiners is created to consist of three members of the state bar to serve for a period of two years."

Sec. 182. In order for the applicant to be eligible for examination for admission to the bar, he must be a citizen of of the United States, a resident of this state, above the age of 21, of good moral character, and a high school education, *or its equivalent.* The practical effect of the last clause is to nullify the requirement. No legal learning is required to make one eligible for the bar examination.

Let us now compare the machinery for the bar examinations with the machinery for examinations in the other professions, together with the necessary requirements to make one eligible for the examination.

The examining boards in dentistry, pharmacy, and medicine are composed of picked men, whose names have been suggested to the Governor by their respective associations, by reason of their special fitness for the work. The Governor, under the law, cannot appoint on the examining board any one save from the list furnished him by the associations. The men, by law, who serve on these several boards, must, (a) have a degree, (b) must have been in the active practice of their profession for a period of from three to five years. This plan of selecting the members of these important boards insures

college trained, efficient and capable boards imbued with an ambition and desire to maintain and uphold the standards of their respective professions. No qualification is required of the person who serves as a law examiner. No statutory requirement or precaution is taken to see that picked and well qualified persons are put on this very important board. The law examiner may never have seen the inside of a court house or a college. Need have no conception of the ideals, history or traditions of the legal profession, and yet, by statute law, he is qualified to say whether an applicant has sufficient learning and is eligible to become a member in full standing, with all the privileges and obligations, of the greatest of all the learned professions.

And, moreover, an association consisting of the most learned and distinguished lawyers of this state sits idly by, year by year, and permits this condition of affairs to continue to exist to the possible detriment and hurt of the legal profession in the state.

If it is expedient and necessary for the well being of the dental profession, the profession of pharmacy and the medical profession that its members see that proper legislation is enacted in order to insure examining boards constituted of men chosen because of their fitness, experience and educational training, why, it may be asked, is it not even more incumbent upon the members of the greatest of all the learned professions to do the same thing? This matter is thus sharply called to your attention because of its importance.

The applicant for license to practice the profession of dentistry, pharmacy, and medicine, must make proof by proper certificate or exhibits that he has a degree from a standard college, or else he is ineligible for the examination. What about the applicant who appears before the examining board of the greatest of all the learned professions? What evidence must he give of literary training? The statutory requirement in its practical working is a nullity. What showing as to legal learning must he exhibit before he is permitted to stand the examination? None, absolutely none. His brain may be void of a solitary legal concept or idea, and yet, he is eligible for the examination. Can one assign a satisfactory reason why the law requires of the man who wishes to practice dentistry, pharmacy, and medicine, a showing that he has a college degree, representing from four to six years' work, and a vast outlay of money, and yet says to the man who wishes to become a member of the greatest of all the learned professions you may enter the list of eligible applicants for examination without making the slightest show of educational requirements or legal learning. Is it of greater moment and importance to the welfare and general good of the state that a man be able to extract a tooth without pain, or fill it properly, than for him to be thoroughly qualified and prepared to deal with representative lives, liberty and property rights of the public in courts of justice? Is the proper administration of justice of less import than the proper rolling of a pill in the apothecary's laboratory? From a perusal of the statute laws one might judge it to be so.

Legal Educational Requirements in Other States

Statistics gathered by the West Publishing Company show only eight states with requirements similar to Mississippi. One state requires proof of only one year's study of the law before applicant is eligible for the examination. Seven states require two years, twenty-five require three to four years study, nine require two years of literary work in a standard college and three years legal study in a standard law school. Hawaii, Porto Rico and the Phillipines require two years' college training and a degree from a standard law school before the applicant is eligible to stand the bar examination. It would, therefore, appear the Hawaiian lawyer, the Porto Rican lawyer, and the Phillipino lawyer, from the standpoint of education and legal learning, is vastly better prepared to do his work in the courts than the average Mississippi lawyer.

The American Bar Association

The American Bar Association and the National Conference of State Bar Associations of the United States say that the great complexity of mod-

ern legal regulations requires for the proper performance of legal services lawyers of broad general education and thorough legal training. The legal education which was fairly adequate under simpler economic conditions is inadequate today. It is the duty of the legal profession to strive to create and maintain standards of legal education and rules for the admission to the bar which will protect the public both from incompetent advisers and from those who would disregard the obligations of professional service.

These organizations endorse and suggest to the several states the adoption of the following:

That every candidate for admission to the bar should give evidence of graduation from a law school complying with the following standards:

(a) It should require as a condition of admission at least two years of study in a college.

(b) It shall require its students to pursue a course of three years duration if they devote substantially all of their working time to their studies, and a longer course, equivalent in number of working hours, if they devote only a part of their working time to their studies.

(c) It shall provide an adequate library available for the use of students.

The foregoing standards are not as high as those of dentistry, pharmacy, engineering, teaching, and medicine, in this state. Your committee would call attention to the words of Hon. Silas H. Strawn, President of the American Bar Association, he says: "I had the misfortune, or rather the shortsightedness, I dare say it may be termed, to graduate from neither a college nor a law school. But it has been my privilege for the last thirty years to have the administrative job of running a law office of some thirty lawyers, and I perhaps am a greater crank on the subject of education than any of you gentlemen, because I have demonstrated the futility of attempting to practice without equipment nowadays. It was very different thirty years ago, but it is perfectly futile for anybody to practice law nowadays unless he has a college and law school education. He cannot get to first base. He can fiddle along and run into bankruptcy courts, and defend those unfortunate who have been selected by the United States as violators of the Volstead Act; but when it comes to anything that requires constructive thought, anything which requires a knowledge of economics, or of world affairs he just cannot do it."

In conclusion, your committee earnestly recommends (1) that the Association give its attention to securing the following legislation; (a) so amending Sec. 180 of Hemingway's Code that all members of the examining board shall consist of examiners who have both law and literary degrees from some standard college approved by the American Bar Association, or the Association of American Law Schools; (b) and shall hold office for four years and shall be appointed by the Governor from a list of twenty nominated by this Association. That the board shall consist of five examiners, one from each Supreme Court district and two from the state at large; (c) that Sec. 182 of Hemingway's Code be so amended that all applicants for examination be required to furnish after September 1, 1930, evidence of at least one year's work in an A grade institution of learning together with evidence of having studied for two full sessions in some law school approved by the American Bar Association or the Association of American Law Schools; (d) and further, that after September 1, 1932, every applicant shall give evidence of having completed two years in some A grade university or college and exhibit a diploma from a standard law school with a course of three sessions work; (e) that the passing grade on a bar examination after September 1, 1932 be fixed at 75 per cent; (f) that Sec. 184 of Hemingway's Code be so amended as to include the following subjects: Contracts, Torts, Damages, Agency, Sales, Corporations, Trusts, and Mississippi Pleading; (g) that Sec. 187 of Hemingway's Code be so amended as to make the fee to be paid by each applicant $25.00 instead of $10.00; (h) the passage of a statute making it incumbent upon the secretary of the board of examiners to keep in a well bound book the names of all applicants for the bar examination, together with the results of the examination. The reports to clearly show the names of all those failing and those to whom license is granted, together with

their postoffice address. Said book to be kept in the office of the Secretary of State and open to public inspection. (2) Your committee would further recommend a committee of seven distinguished lawyers, members of the Association, including president and vice president of the Association, be appointed and charged with the duty of creating sentiment among the bar of the state favorable to the foregoing recommendations, and further, that the committee be empowered to bring these matters before the next legislature at its session in January, 1930, and secure passage of laws which will make effective the suggested changes, or such laws, as in the opinion of the committee will most effectively carry out the recommendations of the American Bar Association. (3) That the committee report whatever progress has been made at the 1929 meeting of this Association.

Respectfully submitted,

T. C. KIMBROUGH, Chairman,
RUFUS CREEKMORE,
LUCY SOMERVILLE HOWORTH,
THOS. L. BAILEY.

Now, gentlemen of the Association, the reason that has impelled your Committee to make the report that it does grows out of the examination it has made of the requirements of other learned professions in the State, and out of the conditions that we find to exist as to the Bar in other states of the Union.

We feel like the time has arrived when the lawyers of Mississippi, when the Bar of Mississippi, when the Bar Association of Mississippi, must take some positive and active steps toward bringing our state in line with the requirements which we find to exist in other progressive states of the Union.

We feel like it is not justice to the people of the State that we further permit this condition of affairs to exist. We know there is an argument abroad in the land that to require these things of the man who expects to practice law cuts out a great many poor boys. I was talking with a number of young men in the law school of the University of Mississippi two days before I came down here, and I asked them what they thought of this argument. They said: There is nothing to it. Of a half dozen young men to whom I was talking, three or four of them were making their own way through the University and the law school. They said if a young man in this day and time has the ability to make a lawyer, and a creditable lawyer, he has the ability also to work his way through the college and get an education and a legal education also. If the argument that we ought not to shut out the poor boy applies to the law, why will it not also apply to the boy or girl who wishes to teach? Three thousand teachers in this State, I would say approximately—out of this great host of teachers they are required in the standard schools

of the State to have a degree; and yet a lawyer, a member of the most learned of all the professions, can study law five months, and perchance if he can get by the Board of Examiners he is entitled to practice the profession in the State.

If the argument will apply to the lawyer, why will it not also apply to the dentist; why will it not apply to the pharmacist; why will it not apply to the medical man? Why, I ask, apply to the legal profession, the greatest of all the professions, alone? Is there any good sound reason for it, that will justify such a position? In all earnestness, gentlemen, your Committee submits these matters for your consideration.

MR. W. L. GUICE: Before the Chairman leaves, I want to ask him a few questions.

JUDGE T. C. KIMBROUGH: Yes, sir.

MR. W. L. GUICE: We haven't much time, and we might be deciding the fate of some young man that comes along ten years from now. I first want to ask the Chairman, if in making his observations as to the Bar of Mississippi, if he intended to intimate in any wise that the Bar of this State doesn't compare favorably with the Bar of those states that have the requirements he has just mentioned?

JUDGE T. C. KIMBROUGH: I cannot answer the gentleman's question as to how the Bar of Mississippi would compare with the eight or nine states having the requirements suggested.

MR. W. L. GUICE: I want to start out, Mr. Chairman, with that, for the reason that I am looking at men now who have never been to a law school; yet, who, in the day they were at the Bar of this State, in my opinion, were the greatest lawyers in this State. I have been all over the United States watching men in court rooms, in places where I didn't practice, and I can stand before this Association today and say the very finest lawyer I ever saw in a court room was Mr. E. J. Bowers. When I first came to the Bar here twenty years ago, Mr. Bowers informed me that he was admitted to practice law when he was seventeen years of age, without the beginning of the requirements that Judge Kimbrough wants. I want to take the opposite of it and state to him that in the last three years I have had men with me . . . . .

PRESIDENT WILBOURN: Pardon me, Mr. Guice; there is no motion before us.

MR. W. L. GUICE: I thought there was a motion to

adopt it. If there is not I want to move to table the report.

MR. G. J. LEFTWICH: I move to adopt the report.

PRESIDENT WILBOURN. I will recognize you to address yourself to the motion to adopt the report.

MR. W. L. GUICE: I want to say, Mr. President, I have seen the opposite of that story in the last three years; that I have had men in my office that Judge Kimbrough turned out; that measuring them from every rule that a man has to go by in estimating what is the ability of a man to serve a people as a lawyer, could not compare with dozens of men that I know.

MR. W. B. MIXON: Will the gentleman yield to a question?

MR. W. L. GUICE: One minute; not right now. Dozens of men I know are attempting to serve the people of this State who have had no education; and in bringing that up before the Association, I want to say to Judge Kimbrough that I never took a bootlegger case; I never go into the bankruptcy court; I am offering my services to the people of my community, and not only have I never gone to a law school, but I have never entered the door of any school for a day in my life.

I want to say to the Association that I have four boys, and that were these requirements here put into the statutory law of Mississippi, I don't see a possibility of them ever following, if they wanted to follow, the profession that most of my forefathers for four generations back have followed. But I know in New York City, and other cities I went to, dozens of sons of bootleggers who can qualify, because they have the money to go through the law schools; and I know some of the best lawyers in this State who are unable at the present time to so qualify.

This is a serious matter. It is a matter that we should not go on record about unless we would be willing to have been judged by it ourselves. I do not think it is necessary for a great many reasons. Two weeks ago I was with an eminent man I don't think can qualify under the rules there, Mr. Will Watkins. I was in the Supreme Court of the United States; there were about fourteen or fifteen lawyers who argued there during the few days I was waiting there for our case to come up, and the best appearance of any of the men on that floor was made by two boys of Mississippi that I know didn't put in five years in the University.

Now, I can give you an example, sitting right over here,

unless he has left, is the best circuit judge in Mississippi, as able a lawyer as ever tried a law suit, Judge Walter A. White. Can any one here say that a man of the calibre and character of Judge White, if he wants to, couldn't come up without the assistance of a law school or college and make himself of service to a community?

MR. W. B. MIXON: Will the gentleman yield?

MR. W. L. GUICE: Now I will yield, yes.

MR. W. B. MIXON: Does the gentleman in his argument contend that you would have this Association go on record as allowing men or women enter this profession unless they are qualified to enter?

MR. W. L. GUICE: I will answer that in a few minutes.

MR. W. B. MIXON: Answer it categorically.

MR. W. L. GUICE: I am not going to answer it. I know I can't do it, and I am too good a lawyer to attempt to answer it. I want to answer another one of the gentleman's propositions with reference to the Phillipino and Cuban. I lived in those countries. He says they are better equipped; he gives you the repuirements that are necessary there. Does he mean to say that the mere fact that a man goes to a college equips him regardless of what is in the man? Go over to the Phillipines and take a half-breed and give him eight years, and take a decent outstanding fine Mississippi boy, from a fine Mississippi family, that can't go to school, and goes into a man's office and studies law, can you tell me that the eight years there will make a better man than the efforts of the man here? I don't believe it. And I want to say, one of the greatest mistakes in this country today is attempting to control the type and character of the men you have in professions by the number of years that somebody is willing to pay for them to go through school, rather than by having some other method whereby you can test the ability of that man to enter the profession.

MR. W. B. MIXON: Will you answer that question?

MR. W. L. GUICE: I will be frank with you, you are a little above me. You must have had about seven years. I didn't.

MR. W. B. MIXON: The question is: Would you contend the man should be admitted to the profession of law without any preparation or knowledge at all?

MR. W. L. GUICE: A great English scholar said the only object and idea of colleges and universities was to

teach a man to read. A man can equip himself to follow any profession, to take up any study and perfect himself to lead in any school of thought without ever entering a day in a school. I want to say to you that more men in the world today are governed by the thoughts of men who never went into a school than those who consider the thoughts of men who did go to school. So, I am not opposing the proper and necessary equipment for a man to enter into this profession; I am not opposing the high type of character you should have in entering the profession; but having gotten in it myself by not going through a school, when I couldn't have gone to school, I am thinking of those who might come after me, to not close the door in their faces and hypocritically take the position or stand that I would have despised. I am standing here for the boy who could and might make us a second Sargeant S. Prentiss, or make us a second Judge Calhoun, and who, perhaps, because of the inability of his family to expend the funds would be denied the entrance into the profession in this State, if they were to adopt this motion.

PRESIDENT WILBOURN: Gentlemen, if we are to conclude the business of the Association within a reasonable time we will have to limit the debates.

MR. W. B. MIXON: I want to submit this proposition: As I understand the recommendation, it doesn't produce the dire calamity that is brought about by my friend. Judge Kimbrough, the Chairman of the Committee, only asks that a man be qualified to enter this profession.

PRESIDENT WILBOURN: The question is called for.

MR. A. W. SHANDS: I believe there is no motion made.

PRESIDENT WILBOURN: Yes, sir; a motion is made, and duly seconded, to adopt the report of the Committee, and the question has been called for.

MR. A. W. SHANDS: I offer this amendment: There will be no regular session of the Legislature until another meeting of this Bar Association, and this is a matter of considerable and vital importance, and I offer as an amendment . . . . .

PRESIDENT WILBOURN: An amendment or substitute?

MR. A. W. SHANDS: Substitute—that this report be ordered printed and distributed to the members of the Association; it is rather long; so that it may be thoroughly understood, and we may be able to digest it before the next

meeting of the Bar Association, and then it be considered on the motion to adopt.

PRESIDENT WILBOURN: The question now is up on Mr. Shands' substitute.

MR. GEORGE BUTLER: I am in sympathy with what Mr. Shands has in mind, but for fear it may not meet with the endorsement of this Bar Association, I rise to a point of order, that our By-Laws require that this kind of report be furnished to the State Bar Association in a stated time; therefore, under our By-Laws we cannot consider this report, and I object to it.

PRESIDENT WILBOURN: You object to this report at this meeting of the Association in view of that By-Law?

MR. GEORGE BUTLER: Yes, sir.

PRESIDENT WILBOURN: And, therefore, nothing can be done but receive the report?

MR. GEORGE BUTLER: Yes, sir.

PRESIDENT WILBOURN: I rule that the gentleman's point of order is well taken.

MR. G. J. LEFTWICH: We have waived that.

PRESIDENT WILBOURN: It has the same effect as the action on the substitute would have.

MR. G. J. LEFTWICH: Every paper has passed without that.

PRESIDENT WILBOURN: The point of order has been made, and we must follow the By-Laws where an objection is made, is the ruling of the Chair. Does the Association want to appeal from that ruling? The report is received, and we pass to the Committee on Obituaries.

MR. W. W. MAGRUDER: I have here today obituaries on the death of five who have passed, and the obituary for Governor Noel is being prepared by Senator H. H. Elmore, and is not at hand at this time.

Judge George McLain was a member of this Association for some years, but for two years he has not maintained membership and it is suggested that a memorial will be prepared for him also; that work has been undertaken by our friend, Mr. A. T. Stovall; both of these memorials will appear in the minutes in due course, but are not ready here today.

BIOGRAPHICAL SKETCH

John Burt Holden, Presiding Justice of Division B, of the Supreme Court of Mississippi, was born January 5, 1873, at the old Holden place in Franklin county, Mississippi. He was the son of Dr. John Everly Holden and Laura

(Curtis) Holden, of Franklin county. Dr. J. E. Holden was born in Pike county, most of his life being spent in Franklin county. He graduated from the Medical Department of Tulane University, New Orleans, La., in 1861; almost immediately joined the Franklin County Rifles and served four years in the Confederate army. He was a prominent and successful surgeon and physician up to the time of his death in 1899. He was the son of Dr. John Holden and Elizabeth Strickland Holden, who were among the progressive families of Franklin county, Mississippi.

Judge Holden's mother was the daughter of John Curtis, of Catahoula Parish, Louisiana.

Judge Holden received his education in the public schools of Franklin county, and studied law in the offices of Col. T. R. Stockdale, C. E. Williams and Judge W. P. Cassedy. He was admitted to the Mississippi Bar in June, 1894, and practiced at Summit for nineteen years.

He was Mayor of Summit for twelve years and became prosecuting attorney for Pike county in 1911. Removing to McComb, he continued his practice until appointed circuit judge in May, 1914, and having filled the office satisfactorily, he was elected for four year term in November of that year. The legislature of 1916 added three judges to the Supreme Bench and Judge Holden was appointed one of the new judges. To this important position he brought ability, a wide experience and an earnest desire to perform with distinction the duties incumbent upon the office. He was popular with the people of his section, and during his service on the Supreme Bench was one of the best liked and the best known of the justices.

Judge Holden was a Democrat and had always taken an active part in the political affairs of his state. He was a member of the Presbyterian church and of the fraternal orders of Masons, Odd Fellows, Elks, Woodmen of the World, and B. of R. T.

On October 17, 1894 he was united in marriage to Mary Cassedy, daughter of Judge Hiram Cassedy and Bettie (Durfey) Cassedy, of Brookhaven, Mississippi. Her paternal grandparents were Judge Hiram Cassedy and Mary (Proby) Cassedy, the latter being the daughter of Captain William Proby, of the Franklin County Rifles, C. S. Mrs. Holden passed away less than a year ago.

Judge Holden is survived by one son, Hiram Cassedy, a graduate of Washington and Lee University, Lexington, Va., in 1916, and in 1920 special agent to the Attorney General, and in 1922 Assistant Attorney General, and now a practicing attorney in Jackson.

Judge Holden served with distinction as president of the Mississippi Bar Association.

His public service was a distinguished one and culminated in his great service to the State of Mississippi as one of the ablest Supreme Court Judges that has ever adorned that Bench. He was earnest, honest, industrious, learned in the law, holding with even hand the scales of Justice in weighing the rights of litigants of every kind and character. The high and the low, the rich and the poor, received at his judicial hands the same consideration guaranteed to each by the law of God and man.

In his passing the State of Mississippi has sustained a great loss and we are forcibly reminded of the saying that "Death loves a shining mark".

The deepest personal and professional sympathy of the members of the Mississippi State Bar Association are hereby extended to his bereaved son. The Secretary of this Association is requested to deliver a copy of this Memorial to our fellow member, Honorable Hiram Cassedy Holden.

W. W. MAGRUDER,
JOHN L. HEISS,
THOMAS H. JOHNSON,
EARL RICHARDSON,
Committee on Obituaries and Memorials.

RICHARD CUNLIFFE McBEE

Honorable R. C. McBee, Greenwood, Mississippi, was born in Lexington,

Holmes county, Mississippi on May 3, 1881, and died in Greenwood, Mississippi on January 25, 1928. He received his literary education at the Normal College of Lexington, Miss., and his legal education at the University of Mississippi. He was married to Hermine Haverkamp of Yazoo City, Miss., and two children were born to them.

He was admitted to the Bar in 1900 and practiced in the city of Lexington until 1912, when he moved to Greenwood, where he continued to reside and engage in the active practice of the law until the time of his death. At the age of twenty-three, the people of his home city of Lexington elected him to his first public office. He served as Mayor of Lexington from 1904 to 1906. In 1908, when only twenty-seven years old, he was elected District Attorney for the Fourth Circuit District, which office he filled with distinction. He did not seek re-election at the expiration of his term, but decided to move to Greenwood to engage in the private practice of his profession.

Mr. McBee was a devout Christian and a member of the Vestry of the Church of the Nativity. He was active in the affairs of the church. He was a splendid citizen, lending his time and energy to all worthy enterprises, and taking a leading part in all community affairs. He was a member of the school board of the city of Greenwood.

His reputation as a lawyer was state wide. He was recognized not only as a worthy and formidable opponent, but also held that higher tribute of an honorable and fair adversary.

W. W. MAGRUDER,
JOHN L. HEISS,
THOMAS H. JOHNSON,
HENRY HILBUN,
EARL RICHARDSON,
Committee on Obituaries and Memorials.

HON. GUY JACK RENCHER

Columbus, Mississippi

Guy Jack Rencher of Columbus, Mississippi, was born December 18, 1877, near Scooba, Mississippi, the son of A. M. Rencher and wife, Mrs. May Jack Rencher. Both lines of his ancestors came from Ireland in early times and settled in North Carolina. Captain James Jack, his great-great-grandfather, was chosen to carry the Declaration of the Mecklinberg Convention, May, 1775, to the Continental Congress in Philadelphia and he commanded also a company through the Revolutionary War. His grandfather was a soldier in the war of 1812 and his father fought through the Civil War with an Alabama regiment and surrendered at last with a part of Hood's men at Meridian, Mississippi.

Guy Jack Rencher attended the public schools of Mississippi in his boyhood and took a special course in Henderson, Tennessee, finishing there in 1898. He graduated from the Law School of the University of Mississippi in June, 1901, and was admitted to the Bar in September of the same year. He began the practice of law in DeKalb and was a member of the House of Representatives from 1908 for eight years. In 1916 he was elected district attorney of the Sixteenth Circuit Court District. At the end of his first term as district attorney he removed to Columbus where he engaged in the private practice of law, and again in 1923 he was elected district attorney, served four years and was re-elected in 1927 without opposition, to begin another four year term in January, 1928. Guy Jack Rencher died on Christmas Day, 1927, from the effects of flu.

Mr. Rencher was a good citizen, a good legislator, a good district attorney and a good lawyer. He was agreeable in the court room, both to the court and opposing counsel, but always loyal and aggressive in the representation of his clients. He had a pleasing manner, a very forceful and convincing power in his arguments both before the court and before the jury.

In 1904 he was married to Rosa Mae Flake, daughter of John and Eliza

Flake, of Oak Grove, Mississippi. At his death he left his widow and a little girl five years old.

Mr. Rencher was a member of the Presbyterian church and has been an elder in that church for a good many years. He was buried in DeKalb by the side of his little boy who had preceded him years before.

W. W. MAGRUDER,
JOHN L. HEISS,
THOMAS H. JOHNSON,
EARL RICHARDSON,
Committee on Obituaries and Memorials.

HON. J. LEM SEAWRIGHT

Ackerman, Mississippi

Hon. J. Lem Seawright was born in Attala county, Mississippi, on the 31st day of October, 1871. He died at his home, Ackerman, Mississippi, on the 31st day of July, 1927, leaving a record of constructive achievement as a permanent memorial to his name. Mr. Seawright was a citizen, a lawyer, and a gentleman. His life was devoted to the welfare of humanity.

He was educated in the common schools of Choctaw county, and graduated at the French Camp Academy in 1890. For many years his work as editor of the Choctaw Plaindealer required his time and attention.

He studied law and was admitted to the Bar in 1902. His parents were Robert M. Seawright and Mary Elizabeth Townsend Seawright. He is survived by his wife, Mrs. J. Lem Seawright, and their three children, Mildred J. Seawright, J. Lem Seawright, Jr., and Robert M. Seawright. His brother, Harper C. Seawright, now operates the Choctaw County Plaindealer.

Mr. Seawright served one term as County Treasurer by appointment from Governor John M. Stone. He also served two terms in the State Senate by mandate of the people of the 23rd district. At the time of his death he was a trustee of the Ackerman High School, Millsaps College, and the State Teachers College. In the presidential election of 1904 he was Mississippi's returning officer. His devotion to the principles of Democracy brought to him every duty and every honor of that party in his county.

He was a business man, a banker, a lawyer and legislator of integrity and intellectual ability. The paramount obligation of his life was to the Lord and Master, whom he served with entire fidelity. As a steward in the Methodist Church and as a delegate to its conference over a term of years, he did a great work. On the day of his death he taught a wonderful lesson of brotherly love to his class of men and women in the Sunday school; and on its completion, he sank quietly into the arms of Him to whom he had consecrated his life.

To his people, his family, his friends, to the truth, to his God, he was true as steel. We who knew him best loved him most. Farewell, good friend, good citizen, good lawyer, good man.

W. W. MAGRUDER,
JOHN L. HEISS,
THOMAS H. JOHNSON,
EARL RICHARDSON,
Committee on Obituaries and Memorials.

I have asked Mr. Gabe Jacobson, who was associated for a number of years in the practice with Harden Brooks, to prepare a memorial, which he has prepared for our deceased friend.

PRESIDENT WILBOURN: I will recognize Mr. Jacobson.

MR. GABE JACOBSON: This is a memorial to Mr. Harden Hairston Brooks:

MEMORIAL TRIBUTE
TO HONORABLE HARDEN HAIRSTON BROOKS

Ladies and Gentlemen of the Mississippi State Bar Association:

Like a child falling asleep over his toys, death came to Harden Hairston Brooks in the midst of his aspirations and daily toil on April 5th, 1928, and forever stilled his earthly endeavors.

Harden Hairston Brooks was born in Noxubee county, Mississippi, near the town of Brooksville, on October 12th, 1877, the son of Harden Hairston Brooks and Georgie Alice Helen Brooks, his father being a native Mississippian and his mother a native Kentuckian.

His early education was obtained in the schools of his native county, and later he acquired his academic education at the Mississippi A. & M. College, and graduated in law at the University of Mississippi, and thereafter before he was twenty-one years of age began the practice of law in Macon, Noxubee county, Miss. He first associated himself in the practice of law with J. E. Rives, and afterwards with W. B. Lucas. On October 1st, 1914, he moved to Meridian and formed a law co-partnership with Gabe Jacobson under the firm name of Jacobson & Brooks, and continued same until a few months before his demise.

Harden Brooks, as he was familiarly called, gave much of his capabilities and career to the State of Mississippi, and to the United States, both of which he loved so dearly. He served as District Attorney in the district in which Noxubee county is situated. He served Noxubee county as a representative in the Mississippi Legislature; he served Lauderdale county as a senator in the Mississippi Legislature. At the entrance of the United States in the World War he gave his time towards the raising of funds, and through his zeal and enthusiasm he raised a battalion artillery of which he was commissioned Major, and went to camp for training and it was during that time that his health became seriously impaired, and over his objection he was mustered out of service on account of ill health.

In June, 1922 his beloved wife, Sallie Erle Windham Brooks, passed to her reward, and there being no children of the marriage, Harden Hairston Brooks continued to battle this life alone.

It may be truthfully said that Harden Brooks was sui generis, possibly unique, for he stood out boldly as a man, different from the ordinary run of men. His ideas, his thoughts, his ways, his love, his dislikes, his way of doing things was somewhat different from that of most men one meets in social, business, and professional life. He was a man of strong convictions, loyal to friends, and one who did not pass much time with his enemies. He had a natural legal ability, and while he did not especially undertake to delve in the intricacies of the law in the quietude of his office, he was quick indeed to grasp the legal points, and master all facts in any cases in which he was employed, and in the heated controversy of a court room trial there were few lawyers who were his equal. He stood out prominently and bravely for what he thought was right; fearless in argument, and attractive and pleasing in address; always "a foeman worthy of any warrior's steel".

In my intimate association with him for nearly fifteen years, I have heard him often express himself as to what he thought constituted a man, and I have heard him say: "I believe the success and prominence of man depends on his having strong convictions and standing by and expressing them regardless of what others thought or expected of him." To a great extent this was his rule of life—but with it all he had a soft heart and generous nature, and a desire to please all who were associated with him, and this generosity and love to help the weak was strongly evidenced in his last will and testament in which he devised unto the negro man and maid servant, who had so long

attended his home, sufficient money with which to purchase a home to shelter them during the remaining years of their lives.

He loved literature and history, and particularly was he well versed in the early history of America, and he admired the rugged pioneer statesmen of the United States, who to him furnished much interest and admiration because of their independence, forbearance, fortitude, and greatness of heart and intellect.

It was in the science of government that he was especially interested, and he delighted to study the affairs of his state, and to his credit it may be said that he did much in the legislative halls of the State of Mississippi to pass laws to encourage industry in the State of Mississippi, and to allay much of the prejudice against our state, and to encourage capital to come and abide with us.

He did not believe in any stinted rule of conduct. His ideas of life were liberal and broad, filled with freedom of action; he did not countenance any narrow ideas or views of creed, religion or race; he believed that there was good and bad in all men, and, too, I have often heard him say: "One man is as good as another, and a little better."

He was such a strong and sturdy character that no one had to speculate as to his position that he would take on any issue, or stand that he would take on any question, private or public. He fearlessly and boldly expressed at all times and everywhere without regard to fear or favor his opinion on any question that might arise—this was one of his outstanding characteristics, and he had the ability, greatness of mind, education, and training to firmly assert with good reason for his action, and when he was understood no person could condemn him for his views, but on the contrary compliment him for his earnestness and honesty of conviction.

In his law practice he never allowed any one or any faction to influence or dictate to him his conduct in a case or his employment thereof, but with due fidelity to his client he gave to every cause in which he was engaged the very best that was in him. He was intellectually of tremendous dynamic ability, and with his majestic sterness of purpose became an outstanding figure to be reconciled with in any controversy.

His association socially was broad and wide; his friends numerous and loyal; his patriotism and zeal unquestioned; his generosity admired, and, thus, we memoralize the passing of one whose memory will survive, and whose prominence of character and deeds of generosity will always be remembered; one who did his very best and who did not drift with the wind or tide, but was a sturdy contender for the right, and ever ready to assert his convictions and beliefs no matter in what cause he was engaged.

Harden Brooks loved people, and disliked seclusion, and he constantly sought association with his fellow being; he was a delightful companion, and the life of most any gathering which was fortunate enough to obtain his presence.

In his life we loved and admired him, and in his death we remember the passing away of another true friend, and noble member of the Mississippi State Bar Association.

Respectfully submitted,

Approved: W. W. Magruder, Chairman.

GABE JACOBSON,
W. W. MAGRUDER

PRESIDENT WILBOURN: I believe that concludes the memorials to be presented.

MR. W. W. MAGRUDER: Mr. Jones desires to present a brief resolution, which the Committee is glad to adopt.

MR. JONES: I offer this resolution, and if adopted

by this Bar Association, will preserve a memorial for all members of the Bar of this State. I will read the resolution:

Be it Resolved by the Mississippi State Bar Association:

That the Supreme Court of the State of Mississippi be petitioned and requested to set apart and designate the first day of its term beginning on the second Monday in September, in each year, as a Memorial Day, at which services in honor and memory of all members of the Bar of the State of Mississippi who may have died in the preceding year shall be held, such services to be conducted in accordance with the regulations of the Supreme Court, and under control of this Bar Association.

Be it further resolved, that the President of this Association appoint a committee of three to present the petition and request to the Supreme Court in order that such Memorial Day may be had at the September 1928 term, if the Supreme Court should see proper to grant the request.

That rule obtains in Louisiana, may it please the members of this Bar Association. I have attended those services in the Louisiana Supreme Court several times. The first day of the term is dedicated to the memory of all members of the Bar of the State—not members of the Association, but members of the Bar of the State who have died in the preceding year; and in my opinion this Association should adopt this resolution, and the first day of the term of each court held in Jackson should be dedicated in memory of our brothers who have died in the preceding year. I move the adoption of this resolution.

SECRETARY JIGGITTS: I second the motion.

PRESIDENT WILBOURN: All in favor of that motion will say AYE; opposed NO. The motion is carried.

What will we do with the report of these memorials?

MR. W. B. MIXON: Mr. President, I move the adoption of the report of the Memorial Committee.

MR. JONES: I second the motion.

MR. W. B. MIXON: I want to say this .....

PRESIDENT WILBOURN: They are calling for the question.

MR. W. B. MIXON: I want to call the attention of this Association to one thing, talking about my friend Harden Brooks, whom I have known for thirty years—I want to say to the members of this Bar that it was due to his diligence and his sublime leadership in the Senate in 1922, that we got the State-wide stock law through in the State of Mississippi.

MR. JOHN A. YEAGER: A point of order, Mr. President. I believe the By-Laws provide that these articles shall be regarded as a part of the minutes of the Association without making a motion to that effect.

PRESIDENT WILBOURN: That is correct. All in favor of the motion to adopt the report of the Committee will say AYE; opposed NO. The motion is carried.

There doesn't seem to be any report from the Legislative Committee, and none of the members of that Committee are with us.

MR. S. E. TRAVIS: We are very glad to welcome Mr. C. B. Ames here, and I can think of nothing more appropriate at this time than that we elect him an honorary member of this association, and I make a motion to that effect.

SECRETARY JIGGITTS: I second the motion.

PRESIDENT WILBOURN: You have heard the motion; all in favor of that motion will say AYE; all opposed NO. The motion is carried, and Mr. Ames is an honorary member of this Association.

MR. J. H. HOWIE: I want to offer a resolution, and move that Article 12 of the Constitution of the Mississippi State Bar Association be amended by adding at the end of said article, the words: "Or he may speak upon such matters of current interest as he may deem of value to the Association"; so that as amended the said Article will read as follows: "The President shall open each annual meeting with an address, in which he shall communicate the most noteworthy changes in the State law on points of general interest and by Congress during the preceding year, or he may speak upon such matters of current interest as he may deem of value to the Association."

Mr. President, this amendment is offered for one purpose, and that is, instead of the President making his address each year and confining his address entirely to a review of the laws that have been passed during the previous year, that he may have the privilege and opportunity of varying that, and making his address upon such matters as he may deem of general interest. I think the rule has been violated more than it has been followed. I move the adoption of that.

MR. G. J. LEFTWICH: Isn't there some limitation .....

PRESIDENT WILBOURN: This Constitution may be amended by three-fourths vote of the members present. I think the motion would be in order under our Constitution. Is there any discussion? All in favor of the motion will say AYE; opposed NO. The motion seems to have been carried.

MR. GABE JACOBSON: I have a communication

here from the American Bar Association to be referred to this Association about a committee on selection of judges. I only want to present this and have the committee appointed to report back to the American Bar Association. I move that you appoint a committee to report back the next time.

MR. R. M. KELLY: I second the motion.

PRESIDENT WILBOURN: All in favor of that motion will say AYE; opposed NO. The motion is carried.

MR. GABE JACOBSON: The pamphlet and letter are turned over to the Secretary.

MR. W. W. MAGRUDER: In connection with that part of your report yesterday morning, Senator Bell, I desire to offer this resolution either for action at this time, or to remain for consideration at our next session, as the Association may deem advisable:

It is resolved and declared by the Mississippi State Bar Association that it does not acquiesce in the passage by the Legislature of Chapter....., Laws of 1928 (Senate Bill No. 1), but we protest against such statute as unsound in principle and of most dubious constitutionality, respectfully urging its repeal at the earliest possible opportunity."

That is the statute that provides, gentlemen, that a man, although insane, may be convicted of murder. Under that statute an idiot or imbecile from his mother's womb in the State of Mississippi may be sentenced for murder and sentenced to the penitentiary for life. The statute stultifies the Constitution of Mississippi, and the Bar Association ought to rise up in opposition to it. I move the adoption of the resolution.

MR. R. M. KELLY: I second the motion.

MR. JOHN A. YEAGER: I want to ask about three sentences on that proposition. I do not take the position that the statute in its present form is proper and correct; but I do say here and now, in the presence of my brethren of the Mississippi Bar, that the legal profession, that profession which we love so well, and so near and dear to our hearts, by reason of this fake insanity plea, is bringing our profession into disrepute and disrespect before the law-abiding citizenship of not only Mississippi, but of America. The condition is such that when a man has committed a crime that is so dastardly and cold-blooded in its nature that no relief or remedy is offered for him within the pales of a law written for the government of a decent and civilized people he immediately goes insane, and on that pretext escapes punishment of the law. These are my convic-

tions and my sentiments, and I want my brethren of the Bar, Mr. President, to know how I feel about it. I am not the author of the bill, but I am heartily in favor and in sympathy with the theory, with its purpose, and with the evil that it is applied to, and I endorse the bill, and endorse the law.

MR. R. M. KELLY: Could I ask you one question?

MR. JOHN A. YEAGER: Could you name one single such case in the State of Mississippi?

MR. JOHN A. YEAGER: How is that?

MR. R. M. KELLY: Name one single such case in the State of Mississippi.

MR. JOHN A. YEAGER: May I sweetly answer that question by saying those cases are so numerous in the State of Mississippi . . . . .

MR. R. M. KELLY: Name just one.

MR. JOHN A. YEAGER: Art thou a stranger in the land, and knoweth not the things that have surely come to pass?

MR. W. A. EVANS: I move that the further consideration of this resolution be passed over until the next meeting.

PRESIDENT WILBOURN: All in favor of that motion to defer action until the next session will say AYE; opposed NO. The motion is carried.

MR. JONES: Mr. President, the Association has seen fit to adopt a resolution offered by me by which the Association petitions the Supreme Court to set aside the first day of the September term as Memorial Day for all members of the Bar of this State who have died in the preceding year. I now make this motion, that the incoming President of this Association name a committee of three persons to present that petition to the Supreme Court of Mississippi during this present term so that we may have a Memorial Day for all of our brothers who have died in the preceding year.

MR. R. M. KELLY: I second the motion.

PRESIDENT WILBOURN: All in favor of that motion will say AYE; opposed NO. The motion is carried and the incoming President will appoint the Committee.

Now, gentlemen, the only business that I know of that remains unattended to is the selection of officers for the ensuing year, and the selection of the next place of meeting. The Constitution provides that the officers of this Association shall consist of one President, one Vice-President,

Secretary-Treasurer, and Executive Committee. Are you ready to proceed to the duties of selecting the officers for the next year?

MR. A. T. STOVALL: Mr. President, I desire to nominate a member of this Association, for President. I desire to put in nomination a member of this Association who was at the beginning of it, who has been at every meeting since then except two, a member of the Association who has rendered service to the Association whenever and wherever called upon, and who would have been present at those two meetings he was absent from but for the fact that he was sick at home one time, and the other time he was in the delta looking after relieving those who were suffering from the flood; a member whose father was the first member of this Association, Honorable Audley Shands, of Cleveland.

MR. JONES: I second that nomination.

MR. W. ESTOPINAL: I want to nominate a man who has distinguished himself as a jurist and as a lawyer, a man who, in my estimation, would make a worthy successor to our most efficient present President, a man who has a pleasant and pleasing disposition, who is possessed of natural wit, who can entertain by witticism, and who can direct the attention and admiration of all by his intelligence and intellect. I want to nominate for that office Honorable W. A. White, our Circuit Judge, of the Second Circuit Court District.

JUDGE D. M. RUSSELL: I second that nomination.

MR. ED. BREWER: I want to nominate before this body a gentleman who belongs to a family of lawyers; whose distinguished father was a member of this Association from its organization, and I think he attended on every meeting; a gentleman who stands out in the State of Mississippi as one of its able, fearless, good lawyers. I nominate Honorable J. L. Byrd.

MR. EARL RICHARDSON: I second the nomination.

Mr. BERRY: I want to place in nomination a gentleman from the suburbs of Gulfport, the Honorable George Currie, of Hattiesburg. He is eminently qualified, has demonstrated his executive ability, and he is a living example of fancy goods that are put up in small packages.

MR. SHOTTS: I move the nominations be now closed.

MR. GABE JACOBSON: I second the motion.

PRESIDENT WILBOURN: All in favor of that motion will say AYE; opposed NO. The motion is carried, and you may now prepare to cast your ballots.

I will appoint Mr. Wells, Mr. Stovall, Mr. Amis, Mr. Mixon and Mr. Evans as tellers.

(On the second ballot Mr. Currie received 63 votes; necessary to a choice 62 votes.)

MR. BREWER: I make a motion that the election of Mr. Currie be made unanimous.

MR. BERRY: I second the motion.

PRESIDENT WILBOURN: It is moved and seconded that the election of Mr. Currie be made unanimous. All in favor of that motion will say AYE; opposed NO. The motion is carried, and the election of Mr. Currie is unanimous.

MR. GEORGE CURRIE: Mr. President, I do not want to detain the members of the Association now for any extended remarks. I can speak better, and they can listen more patiently, after lunch. I am overwhelmed by the gracious courtesy of my brethren at the Bar, and I appreciate far more than I can tell you what to me is the highest honor of my life. I think any lawyer who is judicially called to serve, or who is elevated by his brethren to a position of this sort, ought to have challenged every hour that he has, so as to translate it if he can into service for the members of this Association.

I am highly sensible of my own imperfections, both of character and of conduct, and of the powers with which I am endowed to fulfill the responsibilities of the place. My heart beats full of gratitude to all of my brethren of the Mississippi Bar. I have before me the shining ideals of some of the illustrious leaders of our profession, and it shall be my constant task during the coming year to strive, if I can, to reach those ideals, and to crave for myself your constructive criticism, your helpful suggestions, your cooperation, in order to supplement the mediocracy of my powers, with the sincere hope for making the next year a successful year for the Mississippi Bar Association; and I thank you, my brethren; my heart is with you.

PRESIDENT WILBOURN: It is now in order to proceed to the election of a Vice-President.

JUDGE D. M. RUSSELL: Mr. President, and Gentlemen of the Bar Association: Our hearts have been thrilled today as we have heard the Dean of our great Law School tell us of the ambitious program which he entertained, and in which we all share heartily; I am sure we want to help him in every way we can to the consummation of that ambition. He took us into his confidence far enough to say that

he wants this Association to meet in that new law building in contemplation in 1930 to dedicate it. I think the next step we should take toward that consummation is to elect Judge Kimbrough Vice-President of this Bar Association.

MR. G. J. LEFTWICH: I second the nomination.

MR. A. W. SHANDS: I want to second the nomination of Judge Kimbrough as Vice-President of this Association, and I also ask and make this motion, that the nominations be closed, and that Judge Kimbrough be nominated by acclamation as Vice-President of this Association.

MR. G. J. LEFTWICH: I second the motion.

PRESIDENT WILBOURN: All in favor of that motion will say AYE; opposed NO. Judge Kimbrough is unanimously elected Vice-President.

Now, gentlemen, it is your next duty to select your Executive Committee; your President and Vice-President are ex-officio members of it; one member from each of the Supreme Court Districts of the State must be selected by the representatives from those districts. I suggest that the Southern District assemble in this end of the room, the Middle District in the center of the room, and the Northern District in this end of the room, and choose a member of your Executive Committee, and let's do it promptly.

GOVERNOR BREWER: Mr. President, the Northern District is ready to report. We choose as our Executive Committeeman, Hon. W. C. Sweat, of Corinth, Mississippi.

MR. SHANDS: The Middle District elects Mr. Robert Powell, of Canton.

GOVERNOR THEO. G. BILBO: The Southern District nominates Mr. Sennet Conner for the Southern District.

PRESIDENT WILBOURN: The next matter that comes before you is the selection of the next place for our meeting.

MR. W. L. GUICE: Mr. President, in the name of the good people of my little town, of Biloxi, having had the honor and pleasure of entertaining you twice, I want to again, from the city, the different clubs, constituting the civic life of the town, and the people of the town themselves, extend you an invitation to hold your next Convention in Biloxi.

GOVERNOR BREWER: I desire to place in nomination a place, if you will come, we will guarantee you a round of reception. We cannot say we will exceed the hospitality shown us at Gulfport, because we landed here

at four o'clock in the morning, and four or five of the Gulfport Reception Committee woke us up to know if there was anything they could do for us. But if you will come to the city of Clarksdale, we will promise you a real welcome.

MR. W. V. GILBERT: I am quite sure that no one, except some fellow that held the calf while his mother milked the cow would have the temerity to make any speech in this Association; but since it seems to be the sense of some committee here that every lawyer in the future shall have a calf's skin, I therefore undertake the task. In obedience to the instruction of the Meridian Bar Association, I wish to extend to the Association an invitation to have its next meeting with us.

Now, I know how difficult it is to get away from the Coast, or else we will wear away our welcome in this beautiful Riviera and this beautiful country. We want you in Meridian. It has been some ten years since we had the pleasure and opportunity of entertaining this Bar Association, and I assure you that you can find nowhere a better welcome; you can see no livelier a city. There isn't a place in the State which wouldn't be delighted to entertain us, but I assure you if you come to Meridian that forty cent cotton to a Mississippi farmer, a landslide to a ward politician, a rich bachelor to a despairing old maid, would not be half as welcome to them as you would to us.

Mr. President, I have telegrams here from all of the civic organizations of Meridian, all of the clubs, the Chamber of Commerce, the Mayor of the town, and the President of the Bar Association there urging that this Association meet with us, and we guarantee that you will never receive better entertainment than we will show you.

MR. JOHN A. YEAGER: Has Meridian an asylum?

MR. W. V. GILBERT: Yes.

MR. W. B. MIXON: The gentleman from Lamar spent two nights in it, for I was with him.

MR. SHOTTS: I move the nominations be closed, and that we vote on it by a standing vote.

(A standing vote was taken.)

PRESIDENT WILBOURN: The Association has voted to go to Clarksdale. One more thing: We cannot adjourn this meeting without expressing our gratitude to the people who have so royally entertained us.

MR. W. W. MAGRUDER: Mr. President, I desire to offer this resolution:

RESOLVED: That the Mississippi State Bar Associ-

ation takes great pleasure in extending to the Harrison County Bar Association its thanks and its appreciation for the constant courtesy and its generous hospitality throughout this session of the Association.

MR. SHOTTS: I second the motion.

PRESIDENT WILBOURN: All in favor of that motion will say AYE; opposed NO. The motion is carried.

Upon motion, duly seconded and carried, the Association adjourned sine die.

ROLL OF MEMBERS

Honorary

R. E. L. SANER, Dallas, Texas

C. B. AMES

SUPREME COURT

Division A

SYDNEY SMITH, Chief Justice
W. H. COOK, Associate Justice
J. G. McGOWAN, Associate Justice

Division B

GEO. H. ETHRIDGE, Presiding Justice
W. J. PACK, Associate Justice
W. D. ANDERSON, Associate Justice

FEDERAL JUDGE

E. R. HOLMES.....Yazoo City, Miss.

CIRCUIT JUDGES

C. P. Long.....Tupelo
W. A. White.....Gulfport
Thos E. Pegram.....Ripley
S. F. Davis.....Indianola
J. T. Allen.....Kosciusko
R. L. Corban.....Fayette
W. H. Potter.....Jackson
G. E. Wilson.....Philadelphia
E. L. Brien.....Vicksburg
J. D. Fatheree.....Quitman
W. A. Alcorn, Jr.,.....Clarksdale
R. S. Hall.....Hattiesburg
W. L. Cranford.....Seminary
E. J. Simmons.....Magnolia
J. Q. Langston.....Columbia
J. I. Sturdivant.....Columbus
Greek L. Rice.....Charleston

CHANCELLORS

Allen Cox.....Baldwyn
G. C. Tann.....Hickory
N. R. Sledge.....Senatobia
R. W. Cutrer.....Magnolia
V. J. Stricker.....Jackson
T. P. Guyton.....Kosciusko
Harvey McGehee.....Clarksdale
J. L. Williams.....Indianola
T. P. Dale.....Columbia
V. A. Griffith.....Gulfport

LIFE MEMBERS

W. S. Chapman, Indianola
E. J. Bowers, Gulfport
C. B. Howrey, Oxford
John Sharp Williams, Yazoo City
E. A. White, Laurel

ACTIVE MEMBERS

Armistead, A. A., Vicksburg
Anderson, D. M., Newton
Alexander, Julian P., Jackson
Alexander, James, Jackson
Anderson, John R., Tupelo
Alderman, J. E., Leakesville
Allen, Ward, Drew
Alford, J. M., Tylertown
Adams, J. L., Quitman
Allen, B. B., Indianola
Abernathy, H. B., Houston
Alexander, W. B., Cleveland
Adams, W. C., Corinth
Allen, Joe F., Kosciusko
Amis A, B., Meridian
Amis, A. B. Jr., Meridian
Amis, Marshall, Meridian
Bilbo, T. G., Jackson
Boothe, W. E., Brookhaven
Bradshaw, F. W., Jackson
Butts, A. B., Starkville
Bell, Percy, Greenville
Brewer, Earl, Clarksdale
Barnett, D. R., Yazoo City
Boggan, J. W. P., Tupelo
Baskin, W. E., Meridian
Bozeman, A. S., Meridian
Braham, F. V., Meridian
Barbour, J. F., Yazoo City
Bonelli, A. M., Vicksburg
Brady, T., Brookhaven
Brunini, Jno., Vicksburg
Bramlette, D. C. Jr., Woodville
Brown, J. T., Jackson
Byrd, J. L., Jackson
Busby, Jeff, Houston
Bryan, H. M., Jackson
Brewer, Ed, Clarksdale
Brooks, H. H., Meridian
Boydston, R. W., Louisville
Batson, W. C., Wiggins
Busby, A. G., Waynesboro
Bloomfield, Horace, Pascagoula
Brown, C. S., Gulfport
Backstrom, J. W., Leakesville
Bridges, L. C., Purvis
Butler, George, Jackson
Bratton, Thomas S., Jackson
Brown, G. N., Bay Springs
Blair, W. A., Tupelo
Bush, F. H., Laurel
Berry, S. B., Hattiesburg
Barnett, T. J., Carthage
Bailey, Thos. L., Meridian
Bolton, C. R., Tupelo
Bean, George, Jr., Okolona
Buckhanan, W. F., Okolona
Backstrom, Oscar, Gulfport
Bickerstoff, Reese O., Gulfport
Brandon, E. H., Gulfport
Boswell, H. H., Gulfport
Bozeman, A. S. Jr., Meridian
Buchanan, Frank J., Jackson
Brown, Dillard W., Fulton
Bell, B. F., Starkville
Cassidy, Justin, J., McComb
Creekmore, Wade H., Jackson
Colmer, Wm. M., Pascagoula
Currie, Alexander, Hattiesburg
Conner, B., Hattiesburg
Currie, N. T., Hattiesburg
Campbell, R. B., Greenville
Cutrer, J. W., Clarksdale
Catchings, T. C., Vicksburg
Creekmore, H. H., Water Valley
Crum, C. Lee, New Albany
Caldwell, J. H., Charleston
Cunningham, Jas. A., Booneville
Conner, Sennett, Seminary
Clark, Chas., Cleveland
Currie, Geo. W., Hattiesburg
Clark, Arthur B., Indianola
Chambers, Paul, Jackson
Currie, N. T., Hattiesburg
Currie, J. H., Meridian
Clayton, S. P., Tupelo
Crisler, John W., Clarksdale
Canizaro, Pete, Vicksburg
Cowan, R. C., Gulfport
Cooley, D. B., Laurel
Cassedy, J. W., Brookhaven
Currie, E. J. Jr., Hattiesburg
Collins, Jeff, Laurel
Cook, J. H., Clarksdale
Cook, Miss Vivian, Clarksdale
Crisler, J. Dunton, Clarksdale
Currie, D. T., Hattiesburg
Cook, Sam, Clarksdale
Creekmore, Ruffus, Jackson
Corbin, L. C., Biloxi
Critz, Frank A., West Point
Cassedy, J. W. Jr., Jackson
Conn, W. D., Corinth
Conn, W. D. Jr., Corinth
Crawley, Jas. F., Kosciusko
Caradine, J. E., West Point
Crawford, Marvin, Ashland
Case, H. F., Quitman
Campbell, C. S., Jackson
Crisler, Chas. W., Jackson
Cooper, A. W., Forest
Coleman, Jesse M., Aberdeen
Daniel, G. Odie, Starkville
Davis, Wilkes H.,
Denman, Richard, Charleston
Denny, W. M., Jackson
Drake, J. T., Port Gibson
Dent, R. L., Vicksburg
Dent, E. L., Collins
Dent, A. W., Mendenhall
Deavours, Stone, Laurel
Doxey, Wall, Holly Springs

Dulaney, J. W. Jr., Tunica
Dorroh, I. L., Macon
Davis, T. W., Purvis
Donaldson, W. M., Marks
Dean, Herman, Brookhaven
Doxey, Hindman, Holly Springs
Dinsmore, R. R., Jackson
Dees, Paul, Philadelphia
Ethridge, Frank K., Meridian
Ellis, W. A., Carthage
Estopinal, Wm., Gulfport
Evans, T. M., Gulfport
Engle, C. F., Natchez
Eager, P. H., Jackson
Elmer, F. W. Jr., Biloxi
Edwards, Wm., Shubuta
Enochs, D. C., Jackson
Ethridge, W. N., West Point
Frierson, J. F., Columbus
Fitzgerald, Gerald, Clarksdale
Ford, J. H., Houston
Fant, Lester G., Holly Springs
Felner, Sol., Vicksburg
Finch, H. L., Heidelberg
Flowers, J. N., Jackson
Frazier, T. A., Clarksdale
Ford, R. D., Columbia
Ford, E. J., Pascagoula
Friday, J. E., Booneville
Farley, R. J., Oxford
Foster, C. B., Gulfport
Finley, James A., Tupelo
Floyd, Earl N., Jackson.
Fitzhugh, Lewis T., Gulfport
Ford, Aaron Love, Aberdeen
Galloway, J. F., Gulfport
Green, Marcellus, Jackson
Glass, F. M., Winona
Gwin, S. L., Greenwood
Garnett, Chas. L., Columbus
Gardner, Hanun, Gulfport
Greaves, H. B., Canton
Gilbert, C. O., Winchester
Green, John D. Jr., Starkville
Guice, W. L., Biloxi
Galloway, J. F., Gulfport
Gex, W. J., Bay St. Louis
Gillis, J. K., Philadelphia
Geisenberg, W. A., Natchez
Graham, D. M., Gulfport
Gilbert, Victor, Meridian
Guyton, J. D., Kosciusko
Gipson, J. V., Meridian
Glass, D. H., Kosciusko.
Green, E. H., Cleveland
Green, J. W., Jackson
Hill, N. C., Hattiesburg
Harman, Francis, Hattiesburg
Hewes, Gaston, Gulfport
Hill, C. E., Hattiesburg
Holmes D. W., Hattiesburg
Hopkins, Joe, Lula
Hemingway, Wm., University
Heiss, John L., Gulfport
Holmes, D. B., Meridian
Houston, D. W., Aberdeen
Hibler, Stacy, West Point
Hall, Wm. M., Memphis, Tenn.
Hirsh, J. K., Vicksburg
Hilbun, Henry, Laurel
Hannah, T. C., Hattiesburg
Hamon, Thos. L. Jr., Houston
Heidelberg, D. W., Shubuta
Holmes, J. G., Yazoo City
Hewitt, F. D., McComb
Hemingway, W. M., Oxford
Holden, H. C., Jackson
Holmes, Herbert, Senatobia
Holmes, G. M., Aberdeen
Heidelberg, R. W., Hattiesburg
Hathorn, F. C., Hattiesburg
Harrell, E. B., Canton
Henley, W. S., Hazlehurst
Hendricks, L. F., Jackson
Hennington, Lamar, Hattiesburg
Heiss, John L., Gulfport
Hobbs, A. M., Greenwood
Harper, A. Y., Jackson
Horton, W. T., Jackson
Hillman, J. B., Philadelphia
Hosey, G. W., Laurel
Haralson, Wm., Hattiesburg
Hilton, R. T., Jackson
Hearst, A. A., Hattiesburg
Hindsman, E. E., Jackson
Hair, W. T., Biloxi
Houston, D. W. Jr., Aberdeen
Howie, J. H., Jackson
Haley, L. P., Okolona
Holley, Elmer E., Okolona
Hayden, Chas. R., Gulfport
Hester, C. L., Jackson
Hallam, L. C., Cleveland
Hendrix, T. D., Jackson
Howorth, Joe, Jackson
Inman, Cecil E., Jackson
Jones, R. L., Brookhaven
Jackson, Forest B., McComb
Johnston, T. H., Corinth
Jacobson, Gabe, Meridian
Jones, P. Z., Brookhaven
Jones, Barrett L., Jackson
Johnson, J. L., Pittsboro
Jones, C. J., Waynesboro
Johnson, H. H., Lexington
Johnson, Thos. H., Corinth
Jiggitts, Louis M., Jackson
Johnson, Elbert Sidney, Jr., Bay St. Louis
Johnson, Paul B., Hattiesburg
Jones, Ackland H., Woodville
Kier, W. H., Corinth
Knox, R. H., Jackson
Kelly, R. M., Vicksburg

Kimbrough, T. C., Oxford
Kellner, E. Jr., Greenville
Kuykendall, John M., Charleston
Kelly, A. F., Hattiesburg
Knight, W. A., Gulfport
Kennedy, L. T., Natchez
Kirby, R. H., Clarksdale
Logan, John S., Jackson
Landau, N. D., Vicksburg
Lotterhos, F. H., Jackson
Lindholm, P. P., Lexington
Lyell, G. G., Jackson
Long, Sam H., Tupelo
Leftwich, George J., Aberdeen
Lincoln, C. L., Columbus
Lane, E. M., Raleigh
Leathers, J. A., Gulfport
Luper, O. C., Prentiss
Livingston, W. H., Prentiss
Laub, S. B., Natchez
Loving, B. H., West Point
Leak, H. C., Woodville
Livingston, E. M., Louisville
Lowrey, J. T., Gloster
Lathan, L. F., Eupora
Lewis, T. W. Jr., Columbus
Leach, H. B., Jackson
Lotterhos, Fred, Jr., Jackson
Lathan, S. A., Jackson
Mixon, W. B., McComb
Miller, C. C., Meridian
McGee, R. J., Biloxi
Magruder, W. W., Starkville
Mortimer, T. E., Belzoni
May, G. W., Jackson
Moody, C. C., Indianola
Maynard, G. F., Clarksdale
Miller, R. N., Hazlehurst
Montgomery, F. H., Clarksdale
Munn, W. I., Newton
Mitchell, Geo. T., Tupelo
Majure, R. S., Newton
Murphy, C. S., Belzoni
Morris, Forest M., Hattiesburg
Moss, O. F., Lucedale
May, L. P., Jackson
Morse, S. E., Gulfport
Mize, Sid, Gulfport
Morse, W. E., Jackson
Merrill, G. H., Collins
Mitchell, Guy, Tupelo
Marshall, Carl, Bay St. Louis
Melvin, L. B., Laurel
Montgomery, Goode, Laurel
Monagham, Noel, Tupelo
Mitchell, Chas. S., Tupelo

Malchow, Harold C., Biloxi
Miller, W. B., Clarksdale
Mosely, Niles, Jackson
Matthews, Beverly, Columbus
Moore, W. T., Gulfport
Mitchell, Ely B., Corinth
McIntosh, D. A., Collins
McMorrough, G. H., Lexington
McFarland, B. H., Aberdeen
McBeath, J. M., Meridian
McDonald, W. T., Memphis
McKay, W. J., Vicksburg
McDowell, J. R., Memphis
McLaurin, R. L., Vicksburg
McBee R. C., Greenwood
McCabe, H. C., Vicksburg
McLaurin, S. L., Brandon
McIntyre, W. E., Brandon
McClendon, B. B., Jackson
McFarland, J. A., Bay Springs
McClure, James, Sardis
McGraw, A. B., Philadelphia
McIntosh, H. M., Collins
McLaurin, A. J., Jackson
McIntyre, A. J., West Point
McClelland, Thompson, West Point
McIntosh, L. K., Gulfport
McGowan, H. R., Jackson
Noel, E. F., Lexington
Neill, S. D., Indianola
Noble, Geo. R., Jackson
Noble, Roy P., Laurel
Neilson, E. T., Lexington
Nailling, Myron T., Gulfport
Newsom, Bruce D., Grenada
Nichols, R. L., Forest
Owen, T. C., Columbus
O'Neil, John J., Vicksburg
Odom, H. Talbot, Greenwood .
Oates, O. M., Bay Springs
Osborne, Sam, Greenwood
Powell, Don H., Gulfport
Pace, C. C., Cleveland
Parker, J. E., Meridian
Phillips, Casper C., Meridian
Percy, Leroy, Greenville
Percy, W. A., Greenville
Pepper, A. M., Lexington
Price, J. H., Magnolia
Power, George B., Jackson
Powell, W. H., Canton
Paine, Tom Fite, Aberdeen
Parker, U. B., Wiggins
Pack, W. J., Laurel
Prude, J. O. Jr., Amory
Powell, R. H., Canton

Price, K. G., Gulfport
Potter, Chalmers, Jackson
Price, J. H. Jr., Magnolia
Posey, L. L., Jackson
Potter, M. B., Decatur
Pierce, W. W., Philadelphia
Pack, W. L. Jr., Laurel
Powell, Robert, Jackson
Roberts, M. M., Hattiesburg
Russell, D. M., Gulfport
Robbins, N. Vick, Vicksburg
Ratliff, P. D., Raymond
Rhodes, J. S., Jackson
Roberts, J. C., Cleveland
Robertson, S. V., Jackson
Reiley, M. W., Meridian
Rowe, V. D., Winona
Ross, J. C., Gulfport
Ruff, D. T., Lexington
Russell, R. C., Magee
Richardson, E. S., Philadelphia
Ross, Holt E. J., Laurel
Rowzee, J. R., Newton
Rankin, J. E., Tupelo
Ricketts, Robert B., Jackson
Rencher, G. J., Columbus
Russell, A. Bryon, Bay St. Louis
Simrall, James, Jr., Hattiesburg
Smith, C. C., Richton
Stockstill, T. E., Picayune
Stribling, Dees, Philadelphia
Seale, J. E. Jr., Meridian
Sexton, J. S., Hazlehurst
Sillers, Walter Sr., Rosedale
Stovall, A. T., Columbus
Sively, C. L., Memphis, Tenn.
Somerville, Dr. T. H., Oxford
Shands, A. W., Cleveland
Shannon, C. R., Laurel
Stevens, H. S., Hattiesburg
Stone, W. I., Coffeeville
Sillers, Walter Jr., Rosedale
Stirling, J. B., Jackson
Sweat, N. C., Corinth
Street, Obrey, Ripley
Street, C. S., Laurel
Simmons, W. W., Cleveland
Schauber, A. B., Laurel
Sykes, J. A., Gulfport
Shoots, H. A., Meridian
Seawright, J. Lem, Ackerman
Scott, F. F., Jackson
Spinks, L. P., DeKalb
Sanders, J. O. S., Jackson
Schmitt, Wm. A., Clarksdale
Shaw, Geo. E., Jackson
Somerville, Lucy R., Greenville
Shipman, W. A., Ellisville
Saxon, J. B., Waynesboro
Stevens, J. Morgan, Jackson
Scott, Charley, Jackson
Stone, Phil, Oxford
Smythe, J. G., Kosciusko
Strauss, D. S., Greenville
Stovall, R. C., Okolona
Street, C. C., Paulding
Stevens, Ben, Hattiesburg
Sharp, E. C., Jackson
Searcy, W. P., Drew
Sykes, E. O., Jackson
Sams, W. C., Meridian
Stennis, J. D. Jr., Biloxi
Smith, L. A., Holly Springs
Stribbling, Wm. P., Columbus
Smith, Ed W., Clarksdale
Smith, L. A. Sr., Holly Springs
Stone, T. B., Gulfport
Sweat, N. S., Corinth
Snow, Chas. B., Jackson
Streit, R. S., Jackson
Thompson, R. W. Jr., Gulfport
Travis, J. M., Meridian
Travis, S. E., Hattiesburg
Teat, J. A., Jackson
Tubb, C. L., Aberdeen
Truly, Jeff, Natchez
Thompson, R. H., Jackson
Tucker, W. F., Woodville
Trenholm, E. L., Jackson
Truly, E. G., Fayette
Terrall, S. H., Quitman
Thames, Jas. D., Vicksburg
Thomas, J. M., Tupelo
Thigpen, C. W., Vicksburg
Thompson, J. H., Jackson
Taylor, D. M., Waynesboro
Thompson, Fulton, Jackson
Tucker, Clay B., Woodville

Tyler, Luther L., Picayune
Taylor, J. T., Ellisville
Taylor, J. L., Gulfport
Thompson, J. L., Bay Springs
Talbot, J. M., Clarksdale
Tubb, Thomas J., West Point
Tubb, Talmadge B., Amory
Tally, John R., Hattiesburg
Travis, L. C., Jackson
Teat, Geo., Jackson
Venable, W. W., Clarksdale
Wells, W. Calvin, Jackson
Worsham, B. F., Corinth
Whittington, W. M., Greenwood
Wasson, B. F., Greenville
White, W. A., Gulfport
Welsh, W. S., Laurel
Wilson, Julian C., Memphis, Tenn.
Williams, E. G., McComb
Watkins, W. H., Jackson
Wilbourn, R. E., Meridian
Wilson, H. J., Hazlehurst
Watkins, H. V., Jackson
Wallace, W. L., Lumberton
Whittington, E. F., Clarksdale
Wall, H. V., Brookhaven
Wells, W. C., III, Jackson
Williams, E. B., Poplarville
Wiggington, R. D., Biloxi
Wills, T. Jeffe, Hattiesburg
Wingo, Earl L., Hattiesburg
Wise, Louis, Yazoo City
Witherspoon, S. A., Meridian
Wadlington, W. J., Biloxi
Walker, Roy, Laurel
Windham, E. K., Booneville
Walker, A. G., Biloxi
Whetstone, J. C., Biloxi
Whitfield, G. Q., Jackson
Weaver, Robin, Columbus
Watkins, Wm. Jr., Jackson
Yeager, John A., Lumberton
Young, M. C., Aberdeen

CONSTITUTION

Name

Article I. The name of this Association shall be the Mississippi State Bar Association.

Objects

Art. II. The objects of the Association are to foster legal science, maintain the honor and dignity of the profession of law, to cultivate professional ethics and social intercourse among its members, and to promote improvements in the law and the modes of its administration.

Election of Members

Art. III. Petitions for membership in this Association shall be endorsed by two members thereof, and shall first be considered by the Executive Committee, which committee shall report its recommendation thereon to the Association at its annual meeting, to be held next thereafter. A favorable report by this committee shall entitle a person to membership without ballot, unless a ballot on such report is demanded by some member of the association, and, upon such ballot, five negative votes shall be sufficient to defeat any election for membership.

Membership

Art. IV. Any person shall be eligible to membership in this Association who shall be a member of the Bar of this State, in good standing, and who shall also be nominated as herein provided.

Officers

Art. V. The officers of this Association shall consist of one President, one Vice-President, a Secretary and Treasurer and an Executive Committee, which Executive Committee, shall be constituted as hereinafter provided. Each of these officers shall be elected at each annual meeting for the next ensuing year, but the same person shall not be elected for President for two years in succession. All such elections shall be held by ballot. The Secretary and Treasurer shall be elected by the Executive Committee. The officers elected shall hold office until their successors are elected and qualified according to the Constitution and By-Laws.

Executive Committee

Art. VI. The Executive Committee shall consist of five members, consisting of the President, who shall be ex-officio chairman thereof, the Vice-President, and one member to be elected at large from each Supreme Court District as now constituted, and shall discharge such duties as shall be imposed upon it by the By-Laws. It may be called together by the President or by any three members thereof.

Election of Members

Art. VII. All members of this Convention enrolling themselves and all others who have requested their enrollment, and all persons elected as herein provided, shall become members of the Association upon the payment of the admission fee as herein provided for. But after the adjournment of

this Convention all nominations for membership shall be made as herein provided.

Annual Dues

Art. VIII. Each member shall pay to the Treasurer as annual dues, such sum as may be prescribed by the By-Laws and no person shall be qualified to exercise any privileges of membership who is in default. Such dues shall be payable, and the payment thereof enforced, as may be provided by the By-Laws. Members shall be entitled to receive all publications of the Association free of charge. The admission fee shall be such sum as may be prescribed by the By-Laws, to be paid as the member is elected. The admission fee shall be in lieu of all dues for the first year.

Adoption and Amendment of By-Laws

Art. IX. By-Laws may be adopted or amended at any annual meeting of the Association by a majority of the members present.

Committees

Art. X. The following committees shall be annually appointed by the President for the year ensuing and shall consist of five members each:

1. On Jurisprudence and Law Reform.
2. On Judicial Administration and Remedial Procedure.
3. On Legal Education and Admission to the Bar.
4. On Obituaries and Memorials.
5. On Grievances.
6. On Professional Ethics.
7. Legislative Committee.

And such other committees as may be determined at any meeting.

A majority of those members of any committee who may be present at any meeting of such committee, shall constitute a quorum for the purpose of such meeting. Vacancies in any office provided for by the Constitution shall be filled by the President and the appointee shall hold office until the next meeting of the Association.

Meeting of the Association

Art. XI. The Association shall meet annually at such time and place as it may select, and fifty members present at such meeting shall constitute a quorum. The Secretary shall give sixty days' notice of time and place of such meeting, either by publication in a public newspaper or by personal communication.

Duties of the President

Art. XII. The President shall preside at all meetings of the Association, and shall open each annual meeting with an address, in which he shall communicate the most noteworthy changes in the statute law, on points of general interest, made in the state and by Congress during the preceding year. Should the office of president become vacant by death, resignation or otherwise, the Vice-President shall possess the powers and discharge the duties of such office.

Alterations or Amendments of the Constitution

Art. XIII. This Constitution may be altered or amended by vote of three-fourths of the members present at any annual meeting, but no such change shall be made at any meeting at which less than fifty members are present.

Suspension of Members

Art. XIV. Any member of the Association may be suspended or expelled

for misconduct in his relations to his Associations or in his profession, on conviction thereof, in such manner as may be prescribed by the By-Laws.

Affiliation Plan

Art. XV. A Local or County Bar Association in Mississippi may become affiliated with the Association on certification to the Secretary of this Association by its officers that such Local or County Association has voted to affiliate itself with this Association pursuant to the Constitution of this Association, and acceptance of such Association by vote of the Executive Committee of this Association; and such affiliation shall continue until terminated either by vote of the Local or County Association or by vote of the Executive Committee of this Association. Each such affiliated Local or County Association shall certify annually to the Secretary of this Association any change in its membership, and pay to this Association an annual fee for each member of said Local or County Association at the rate from time to time provided by or pursuant to the terms of the Constitution or By-Laws of this Association; and all such affiliated associations shall co-operate with each other and with this Association and their and its respective committees in carrying out the objects of this Association.

No member of the bar of any city, town or village, or county, in which there shall be at the time such an affiliated association, shall hereafter be eligible to membership in this Association except as a member of such Local or County Association; and the termination of the membership of any member in any such affiliated association shall ipso facto terminate his membership in this Association. In case of the termination of affiliation of any such Local or County Association with this Association, all members of the affiliated association so desiring may remain members of this Association by paying the regular dues at the rate from time to time provided by the Constitution or By-Laws of this State Association

BY-LAWS

I. President

The President shall preside at all meetings of the Association, and in case of absence, the Vice-President shall preside.

II. Secretary and Treasurer

The Secretary and Treasurer shall keep a record of all meetings of the Association, and of all other matters of which record shall be deemed advisable by the Association and shall conduct the correspondence of the Association, with the concurrence of the President. He shall notify the officers and members of their election, and shall keep a roll of the members and shall issue notices of all meetings; and shall collect, and, under the direction of the Executive Committee, disburse all funds of the Association. He shall report annually, and oftener if required; he shall keep regular accounts, which shall be at all times open to the inspection of the members of the Association. His accounts shall be audited by the Executive Committee. Before discharging any of the duties of this office, the incumbent shall excute a bond with good and sufficient surety, to be approved by the President, payable to the President and his successors in office in the sum of two thousand ($2,000.00) dollars, for the use of the Association and conditioned that he will well and faithfully perform the duties of his office so long as he discharges any of the duties thereof.

III. Executive Committee

The Executive Committee shall have power to make such regulations, not inconsistent with the Constitution and By-Laws, as shall be necessary for the protection of the property of the Association, and for the preservation of good order and conduct of its affairs. It shall keep a record of its proceedings. It shall direct the manner and the purposes for which all funds of the Association shall be disbursed, but it shall have no power to make the Association liable for any debts amounting to more than the amount in the treasury at any one time not subject to prior liabilities. It shall have the power to change the time and place for the holding of any annual meeting of the Association when, in its judgment, it is necessary or proper to do so. It shall select some person to make an address at each annual meeting, and not exceeding three members of the Association to read papers.

IV. Order of Business

At each annual, stated or adjourned meeting of the Association, the order of business shall be as follows:

1. Reading of Minutes of preceding meeting.
2. Address of President.
3. Report of the Secretary and Treasurer.
4. Report of Executive Committee.
5. Election, if any, to Membership.
6. Report of Standing Committees.
7. Report of Special Committees.
8. Report of Miscellaneous Committees.
9. Miscellaneous Business.
10. Election of Delegates to American Bar Association.
11. Election of Officers.

The election of officers shall be held on the morning of the second day of the session.

The order of business may be changed by a vote of the majority of the members present.

No person in discussion shall occupy more than ten minutes at a time, nor be heard more than twice on the same subject.

The parliamentary rules and order contained in Robert's Rules of Order, except otherwise herein provided, shall govern all meetings of the Association.

V. Members Elect

Any person elected to membership who shall fail to pay his admission fee within one month after notice of his election shall be deemed to have declined to become a member.

VI. Committees

In pursuance of Article X of the Constitution, there shall be the following standing committees:

1. A Committee on Jurisprudence and Law Reform, who shall be charged with the duty of attention to all proposed changes in the law, and of recommending such as, in their opinion, may be entitled to favorable consideration of the Association.

2. A Committee on Judicial Administration and Remedial Procedure, who shall be charged with the duty of the observation of the workings of our judicial system, the collection of information, the entertaining and examination of projects for a change of reform in the system, and of recommending from time to time to the Association such action as they deem expedient.

3. A Committee on Legal Education and Admission to the Bar, who shall be charged with the duty of examining and reporting what change it is expedient to propose in the system and mode of legal education, and of admission to the practice of the profession in the State of Mississippi.

4. A Committee on Obituaries and Memorials, who shall present suitable resolutions in memory of members who have died during the preceding year.

5. A Committee on Grievances, who shall be charged with the hearing of all complaints which may be made in matters affecting the interests of the legal profession and the practice of law and the administration of justice, and to report same to this Association with such recommendations as they may deem advisable; and said committee shall in behalf of the Association, institute and carry on such proceedings against offenders, and to such extent as the Association may order, the cost of the proceedings to be paid by the Treasurer on the warrant of the Executive Committee out of any moneys subject to be appropriated by them.

6. A Committee to consist of five members and known as the Committee on Professional Ethics, who shall be charged with the duty of answering in writing all questions relating to the ethics of the legal profession submitted to them in writing by any member of this Association, that, in their judgment, ought to be answered, reporting to the Association all questions submitted to and answered by them, together with their answers thereto. Any question answered by them, together with their answer thereto, may be made public by them at any time they see fit.

7. A committee to be composed of five members, of which the President shall be ex-officio member, whose duty it shall be to appear before the Legislature at each session thereof, at the expense of this Association, there to present and and urge upon the Legislature the desirability of enacting into law such suggestions.

VII. Appointment

Each of the standing committees shall consist of five members, and shall be appointed annually by the President of the Association, and shall continue in office until the annual meeting of the association next after their appointment and until their successors are appointed, with power to adopt rules for their own government, not inconsistent with the character, Constitution or these By-Laws. Any standing committee of the Association may,

by rule, provide that three succesive absences from the meetings of the committee, unexcused, shall be deemed a resignation by the member so absent from his place upon the committee. Any standing committee of the Association may, by rule, impose upon its members a fine for non-attendance, and may provide for the disposition of the fines collected under such rules.

All reports of standing and special committees shall be filed with the Secretary, in writing, not less than thirty days before the annual meeting of the Association.

VII. Charges Against Members

Whenever any complaint shall be preferred against a member of the Association for misconduct in his relations to this Association, the member or members preferring such complaint shall present it to the Committee on Grievances, in writing, and subscribed by him or them, plainly stating the matter complained of, with particulars of time, place and circumstances. The committe shall carefully examine and consider the same after giving reasonable notice to the party against whom the complaint is made of the time and place of hearing, and shall report to the Association at the next annual meeting, recommending what action it should take in the premises.

IX. Charges Against Lawyers and Judges

All complaints which may be preferred against lawyers or judges, affecting their professional or official conduct shall be inquired into and examined by the Committee on Grievances, on behalf of the Association, in such manner as may be authorized and prescribed by the laws of the State.

X. Nominations and Elections

Nominations of candidates to fill the respective offices, except the office of Secretary and Treasurer, may be made at the time of election by any member, and as many candidates may be nominated for each office as members may wish to name, but all elections, whether to office or membership, must be by ballot. A majority of the votes cast shall be sufficient to elect to office, but five negative votes shall be sufficient to defeat an election to membership.

XI. Supplying Vacancies

All vacancies in an office or committee of this Association shall be filled by appointment of the President and the persons thus appointed shall hold for the unexpired term of his predecessor; but if a vacancy in the office of President, it shall be filled by the Association at its first stated meeting occurring more than ten days after the happening of such vacancy, and the person elected shall hold for the unexpired term of his predecessor.

XII. Annual Dues

Each member shall pay to the Secretary and Treasurer of the Association the sum of five dollars annual dues, and an admission fee of five dollars shall be paid to the Secretary and Treasurer as the member is elected. All annual dues shall be paid on or before the first day of March in each year, and any member failing to pay his annual dues by that time shall be in default, provided ten days' notice thereof shall have been given him by the Secretary and Treasurer; and thereupon the Executive Committee may, without further notice, cause the name of such member to be stricken from the roll for nonpayment of dues, and his membership, and all rights in respect thereto will thereupon cease. A member who has been dropped from the roll for nonpayment of dues may be restored to membership by the Executive Committee upon the payment of such back dues as the committee shall think equitable.

XIII. Amendment of By-Laws

These By-Laws may be amended at any stated, adjourned or annual meeting of the Association by a majority of those present.

XIV. Resignation of Officers and Members

Any officer may resign at any time upon settling his accounts with the Association. A member may resign at any time upon the payment of all dues to the Association, and from the date of the receipt by the Secretary and Treasurer of a notice of resignation, provided that all dues have been paid, the person giving such notice shall cease to be a member of the Association.

XV. Salary of Secretary and Treasurer

The annual salary of the Secretary and Treasurer shall be three hundred dollars, one-half of which shall be due on the first day of May, and the other half on the first day of November in each year, but may be paid earlier, or at earlier times if the Executive Committee shall, in writing, so direct; but this shall be in full of all compensation to him. No other officer of the Association shall receive any salary or compensation.

XVI. Special Meetings

If the President and Executive Committee shall determine that it is necessary for the Association to hold any other meeting during the year than the regular annual meeting, the same shall be held at such time and place as the President and Executive Committee may fix, upon twenty days' notice of such time and place, to be given by the Secretary and Treasurer by publication in a newspaper and notice thereof to each member; and the Secretary and Treasurer shall give this notice upon order of the President.

XVII. Honorary Members

All judges of the Supreme, Circuit and Chancery Courts of this State and the United States Judge for the two districts of this State are honorary members of this Association, and they are relieved from the payment of admission fees and dues.

XVIII. Certificate of Membership

A certificate of membership shall be issued to each member of this Association upon his election and payment of initiation fee, which certificate shall be signed by the President and Secretary.

XIX. Annual Meetings

The annual meeting of the Association shall be held on the first Wednesday after the last Monday of April of each year, and the ladies constituting part of the family of members are invited to attend all proceedings including the banquet.

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Editorial

A LETTER WRITTEN BY A LEADER AT THE ROMAN BAR

Pliny the Younger lived in the latter part of the first century A. D. He was an ardent admirer of Cicero, the great advocate, the gifted orator of an earlier age. At the time that this letter was written Tacitus alone shared the honors with him at the Roman Bar. The letter which is given below was written to his friend Statius Sabinus. Its ethical teachings are so lofty that it deserves to be read by those today who are preparing to practice the noble profession which he adorned.

"You write me that Sabina, who left us as her heirs, nowhere ordered that her slave Modestus be freed, but yet that she left him a legacy in the following terms: 'To Modestus, whom I have ordered to be freed.' You ask what my opinion is. I have conferred with men learned in the law. They all agree that freedom is not due him because it was not bestowed and that he is not entitled to the legacy because the testator bestowed it upon her slave. But in my opinion they are clearly in the wrong, and I think that you will agree with me. We must act as if Sabina had bestowed freedom upon him because she thought that she had done so.

"I am confident that you will accept my opinion because you are accustomed to regard the wishes of the dead which it is fitting for worthy heirs to have understood; for with us honor is not less binding than necessity with others.

"Let him, then, remain free with our consent, let him enjoy his legacy as if she had arranged all things with the utmost care. In fact, she did arrange with care inasmuch as she selected her heirs with care. Farewell."

The primary purpose of this Law Journal, is to be of service and benefit to the lawyers, and law students

throughout the State of Mississippi. In each issue there will appear articles contributed by the lawyers of the State upon legal questions of contemporary interest; also material from the faculty and students of the University of Mississippi Law School.

If our endeavor should fail in some respects, I feel that our labors will be amply rewarded if we are able to impress upon our readers the importance of observing the ethical principles of this honorable profession. It has been said that only an honorable man can practice law—others may attempt to do so. In our application of the multitudinous principles of the substantive and adjective law we should ever keep in mind that the law is a jealous mistress and does not desire "tools that will turn in her hands."

G. D. S.

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HISTORICAL SKETCH OF THE LAW DEPARTMENT OF THE UNIVERSITY OF MISSISSIPPI

The University of Mississippi is a corporation solely created by legislative act and clothed with the powers of an ordinary individual in many respects, and in addition thereto is charged with the duty of maintaining a State University.

The University came into existence as a corporate entity in 1844, and formally opened its doors to students in 1848. Six years later, 1854, the charter of corporation was amended by an act of the legislature, which amendment conferred the power to organize and operate a department of law. This amendment was made by the legislature at the request of the board of trustees. It may be of interest to note the personnel of this first board of trustees: Hon. J. Alexander Ventress, Judge William L. Sharkey, Hon. John Anthony Quitman, Judge Alex. M. Clayton, Hon. William Y. Gholson, Hon. Jacob Thompson and Hon. G. Pinckney Smith. But few greater names adorn the pages of Mississippi history. The law department ranks as one of the oldest in the country. The Harvard Law School and Litchfield Law School of Connecticut were organized about 1817, but neither did any effective work until 1823, when Chancellor Kent, famous as the writer of Kent Commentaries, became the head of Harvard Law School, and made it famous. This antedated the organization of the department of law of the State of Mississippi by thirty-one years. The law department of the University of Virginia, by far the oldest in the South, was created in 1826, and began active work in 1828, that is twenty-six years prior to the creation of the law department of the University of Mississippi. The fact is the law department of the University was actively at work before schools of law were organized in the universities of South Carolina, Georgia, Florida, Louisiana, Tennessee, and Kentucky, and long before there were any schools of law in the universities of Indiana, Illinois, and

Iowa. William F. Stearns was the first instructor in the law school, having been elected in the summer of 1854. Dr. Stearns was a member of the bar of Marshall County, having practiced law in Holly Springs with success for a number of years. He was not a native Mississippian, having been born in the State of New York, and educated in northern universities. Dr. Stearns continued at the head of the law department until 1861, when the doors of the university were closed by the Civil War. He made a gift to the university of his law library, which consisted of a few well known text books on different branches of the law, together with an early New York Report. These few volumes, not over 150, constituted the first law library of the University of Mississippi. They may now be found in the "stack room" of the present large law library of more than 7500 workable volumes, with approximately 8500 volumes in all.

The legislature, by act, created a Second Chair of Law in 1860, and Judge James F. Trotter was elected to fill the same. Judge Trotter was a distinguished jurist, having served during the years 1838-39 as a judge of the high court of errors and appeals of Mississippi, along with Judges William L. Sharkey and P. Rutillieus R. Pray. Later in 1855-56 he was Vice-Chancellor of the Northern district of Mississippi. He performed the duties of professor for only one year.

The first class consisting of only six men was graduated from the law department in 1856. In all, up to the breaking out of the war, there were about sixty-five graduates of the law school. From the available records forty to forty-five of this number entered the Confederate armies; those who did not enter having died or being incapable of military service. Practically the whole class of 1861 entered the service. Out of the forty or forty-five men who did enter the service, all young, four rose to the rank of major, seven to the rank of colonel, eight to the rank of captain, six to the rank of first lieutenant, and one to the rank of adjutant, making a total of 26 officers. Many of those who joined the ranks were killed or disabled early in the war and had no chance of promotion. Those composing the law classes prior to the war, who afterwards became prominent in the history of the State, might be mentioned: Judge Thomas John Walton; Hon. William R. Barksdale, member of the Grenada Bar; Hon. Henry L. Muldrow, a member of Congress, first Assistant Secretary of the Interior during Cleveland's first administration, and later a Chancery Judge; Hon. John A. Blair of Tupelo; Henry Minor Scales;

Hon. Thomas R. Stockdale, a member of Congress and Justice of the Supreme Court of Mississippi; J. W. Falkner, Jas. T. Fant; Major Edward Turner Sykes; Col. A. Y. Harper; Judge Baxter McFarland; Hon. Kinloch Falconer, Hernando DeSoto Money, United States Senator; Geo. Hamilton Lester, member Constitutional Convention, 1890.

The law department was re-organized in 1866, and Hon. L. Q. C. Lamar, the greatest teacher the department has ever had in its history was elected to the Chair of Law, and served in that capacity until 1870. Col. Lamar then resigned to re-enter the political field. His biographer, in speaking of him as an instructor, says, that he possessed every element of a great teacher; that he was profoundly learned in the subjects he taught; possessed the love and admiration of his students and bound them to him as if by hooks of steel. During the four years Col. Lamar was at the head of the law department there came under his sway and influence, as students, numbers of young Mississippians who, in the years that followed, contributed largely in directing the destiny of the State. Among this number it may be interesting to note the names of Charles B. Howry, Judge Hiram Cassidy, Hon. Wiley N. Nash, Dabney Minor Scales, Judge E. O. Sykes, Samuel R. Coleman, Hon. Chapman L. Anderson, Hon. John W. T. Falkner, Hon. Green B. Huddleston, Hon. James F. McCool, Hon. John M. Allen of Tupelo, Judge I. T. Blount, Judge Henry Conn, Hon. J. B. H. Hemingway, Hon. Edward Mayes, Judge R. H. Thompson, Hon. Thomas Keith and Judge J. S. Terral.

After the resignation of Col. Lamar in 1870 the board of trustees tendered the Chair of Law to Judge J. A. P. Campbell, choosing the most distinguished Judge Mississippi ever produced, who seriously considered the matter of accepting the place, but other matters intervening he finally declined the honor. In 1871, Judge Thomas Walton, graduate of the law class of 1857, accepted the Chair of Law and served for three years. Judge Walton had served with great gallantry in the Civil War, rising to the rank of major. After severing his relations with the law department he served for a number of years as Chancellor of the Twelfth Chancery District of Mississippi.

The law school was suspended from 1874 to 1877 either from the lack of funds or because of the general unsettled condition of the country incident to the reconstruction era.

In 1877 Hon. Edward Mayes, a most distinguished lawyer, a student under Col. Lamar and a son-in-law, became the head of the law school. He served in this capacity

fifteen years; that is, from 1877 to 1892. Mr. Mayes resigned to accept a position of State Counsel for the Yazoo and Mississippi Valley and Illinois Central Railway line, with offices in Jackson, Mississippi.

Judge Albert Hall Whitfield, an alumnus of the law department, followed Mr. Mayes in the law department, resigning, however, in 1894 to accept the appointment of Supreme Court Judge. Judge Whitfield was brilliant as a lawyer and judge and magnetic as an orator.

Upon the resignation of Judge Whitfield, Gov. Garvin D. Shands, of Senatobia, was elected to the Chair of Law. Gov. Shands was a Confederate soldier and had served as a Lieutenant Governor of the State. He was an able lawyer and strong advocate. There was a considerable increase in the attendance in the law school during Gov. Shands administration, which made it necessary to again place two men in the department. The trustees in 1897 elected that elegant gentleman and splendid lawyer, Hon. Thos. Hugh Somerville, of Winona, Mississippi, to fill the second chair.

In 1897 the trustees created the office of Dean. This distinction was conferred upon Gov. Shands, who thereby became the first Dean of the law department.

Gov. Shands in 1905, resigned to accept the Chair of Common Law in Tulane University, New Orleans, La., and afterwards became Dean of that school of law. Mr. Somerville then succeeded to the office of Dean, and Hon. Clarence L. Sivley was elected to the vacant chair. Mr. Sivley had served for only one session, however, when he was tendered and accepted a lucrative position as attorney for the Illinois Central Railroad. He now has offices in Memphis, Tennessee, representing southern lines of the foregoing company. Hon. J. Elmore Holmes of the Hernando Bar, a graduate of the law school and an able lawyer, succeeded to the chair made vacant by Mr. Sivley. After a short service in the law school a flattering offer af a law partnership took him to Memphis, Tennessee, where he has achieved success.

Dr. Leonard J. Farley of the Hernando Bar succeeded Mr. Holmes. Dr. Farley, when he came to the law department, had won success as a practicing lawyer; he had been a teacher in his early life and this taken together with his learning as a lawyer fitted him for the position to which he had been elected. His strong forte was the Common Law. It can be asserted of him that he had but few equals as a lecturer on Common Law.

Dean Somerville retired in 1913 from active work in

the school of law and was given the honor of Emeritus Dean of the law department.

Judge Duke M. Kimbrough was elected to the chair made vacant by the retirement of Mr. Somerville. Judge Duke Kimbrough was a graduate of both the law and literary departments of the university, and had served as Chancellor of the Third Chancery District, being appointed by Governor Noel. It is of interest to note that Judge Duke Kimbrough's father, Judge B. T. Kimbrough, served with distinction as Chancellor of the same district for sixteen years. Judge Duke Kimbrough, at his own request, at the close of the session of 1919-20, was granted one year's leave of absence by the board of trustees, but before the year had expired notified the board of his purpose to finally retire as professor of law of the school. He is now engaged in a lucrative practice of law in Boulder, Colorado. The board of trustees in the spring of 1920 tendered to Judge T. C. Kimbrough of West Point, Miss., a chair in the school of law, which was accepted by him. Judge Kimbrough is an alumnus of the University of Mississippi and a graduate of the Millsaps Law School. He had practiced law as a member of the firm of Critz & Kimbrough, which firm participated in a great deal of important litigation in that section of the state during those years. Judge Kimbrough served as Circuit Judge of the Sixteenth Judicial District of Mississippi. After serving one year as professor of law, Judge Kimbrough was made Dean of the school of law, succeeding Dean Farley, who died during the summer of 1921. Under the authority of the board of trustees and Chancellor J. N. Powers, Judge Kimbrough worked out a three year program of study for the law school, which materially enlarged the old course of study and added many new and important subjects of the law to the course. Under this new program, in order to secure a degree from the school of law, three sessions work of nine months each were required. This schedule was immediately adopted by the board of trustees.

Hon. William Hemingway of Jackson Mississippi, an alumnus of the University of Mississippi was elected to take the chair made vacant by Dr. Farley's death. Mr. Hemingway was formerly Mayor and for some years, Corporation Counsel for the City of Jackson; the author of Hemingway's Code of 1917, and was at the time of his election Assistant Attorney General, which place he resigned to accept the Chair of Law. He has published a second code of the laws of Mississippi, which is known as Hemingway's 1927 Code.

In the summer of 1922 Chancellor D. M. Russell of the

Tenth Chancery District was elected to fill the Third Chair of Law, which was created by the board of trustees. Judge Russell had made quite a reputation as a strong and able Chancellor. After a short stay in the school of law, he resigned and entered the practice of law. He has enjoyed an excellent practice. During the past month he was appointed by Governor Bilbo to fill the unexpired term of Chancellor Griffith, of the Eighth Judicial District, who was recently elected to the Supreme Bench of Mississippi.

ROBERDS TOOK RUSSELL'S PLACE

Honorable W. G. Roberds was elected by the board of trustees, in the summer of 1926, to take the vacancy made by the resignation of Judge Russell. Mr. Roberds was a prominent member of the West Point Bar—practicing under the firm name of Roberds and Beckett. Later, he was associated with Judge McIntyre, under the firm name of Roberds and McIntyre.

Robert J. Farley, a son of Dean Farley, is an assistant professor, being elected to fill this position by the board of trustees in the summer of 1926.

During the session of 1922-23, the Chancellor and Dean Kimbrough actively undertook the work of bringing the law school up to grade "A". This was successfully done and in February of that year the school became a full member of the Association of American Law Schools. At the December 1926 meeting of the association, the school of law of the university was placed on probation, for not meeting some of the requirements of that association, that were set out in the Articles of Association. The failure of the law school to meet all these requirements was in no sense the fault of the law school faculty. They were matters beyond their control for the most part, such as wholly inadequate physical equipment and maintenance funds.

Dean Kimbrough immediately set out to have the law school placed again in the full membership of the association and, on June 11, 1927, explained before the Mississippi State Bar Association at its meeting in Jackson, the situation under which the department labored, in the above respects. The context of his speech giving the reasons for probation are worthy of consideration. The speech by vote of the association was printed in pamphlet form and may be had from the Secretary of the State Bar Association.

Gentlemen, the matter I wish to discuss with you this morning, and to bring to your attention, has to do with the relation.

The association after hearing Dean Kimbrough's state-

ment of the handicap under which the law school was laboring and the work that had been done, by the school while so handicapped, by resolution, unanimously approved and endorsed the work of the school and appointed a committee, composed of the following distinguished lawyers of the State, who were authorized and directed, on behalf of the Bar Association to visit the law school, and make a report of their findings and suggest a course to be followed, in order to remedy the existing situation. This committee, composed of Judge D. W. Houston, Aberdeen, Chairman; Judge Price, Magnolia; Judge Stone Deavours, Laurel; Judge E. O. Sykes, Jackson; Hon. Wall Doxey, Holly Springs; Judge Venable, of Clarksdale; J. H. Currie, Meridian and Judge A. J. McIntyre, of West Point; visited the university and made an investigation into the affairs of the law school.

A report made by this committee set forth with unanimity, that the law school was doing its work in a most satisfactory manner, while laboring under great handicaps, as to equipment and lack of sufficient teaching force in its faculty. They especially commend the work of the school by the following resolution to the State Legislature: "We, your committee, endorse the splendid work which has been done, and is now being done by the present law faculty. They are laboring under great handicaps and disadvantages, yet are obtaining most excellent results, and we commend their methods and their faithful, untiring and efficient efforts as law instructors. They are overworked and their number should be increased."

The committee proposed suitable resolutions, memorializing the legislature to appropriate the sum of $150,000.00, for a new law building and proper equipment, and further recommended that at least an additional full time professor, be added to the teaching staff.

This memorial was presented to the legislature at its meeting in January, 1928, by the above committee. The president of the Bar Association likewise, made one or two visits to Jackson, and conferred with members of the legislature and urged the great necessity of the appropriation, in order to relieve the unfortunate condition then existing. The governor, together with a very large majority of members of the legislature, favored the appropriation. In fact many lawyers throughout the state, vigorously interested themselves, with the result an appropriation of $150,000.00 was made for a new law building, equipment and law library.

The law school appreciates the fine response made by

the bar, the governor and the legislature, to Dean Kimbrough's appeal for help.

The rules of the association, are now being complied with by the University of Mississippi, as far as it is possible to do so with its present physical equipment. Because of the lack of classroom space, the law library, out of necessity must be used as a part-time classroom. With the new building provided for this inadequacy will be fully remedied. The plans and specifications of the proposed law building will appear in the next issue of this journal. With this building, the present inadequacies of the law department will be fully met, and the University of Mississippi Law School will be restored to its former position as an "A" grade school.

THE RULE IN PINNEL'S CASE

By William S. Hemingway

A prominent official, after delivering the diplomas to members of the graduating law class, advised them to be progressive and modern and to get away from moldy precedents; the accuracy of that statement is not now to be challenged, neither is assent given; the official, however, voiced the general impression of the laity and there are some cases which lend color to such statements, some rules which courts condemn and yet follow.

One of such cases has been selected for review. It is the alleged. "Rule in Pinnel's Case", 1st English Ruling Cases 368, 5 Coke 117, decided in 1602. The rule was, as stated in the language of Lord Coke, "But when the whole sum is due by no intendment the acceptance of parcel can be a satisfaction to the plaintiff". That is the rule from which few courts have dissented.

It is stated further in the opinion, "and it was resolved by the whole court that payment of a lesser sum in satisfaction of a greater can not be any satisfaction for the whole, because it appears to the judges that by no possibility a lesser sum can be a satisfaction to the plaintiff for the greater sum".

Lord Coke also stated, "but in this case the plaintiff had judgment for the insufficient pleading for he did not plead that he had paid the £15, 2 S., 2d in full satisfaction (as by law he ought) but pleaded the payment of part generally and that the plaintiff accepted it in full satisfaction" * * * and for this cause the judgment was given for the plaintiff. From this it will be discerned that the case was decided on the pleading and that the so called rule was dicta though it may have correctly stated the law as applied to other cases. Many courts take as a precedent the statement that the part payment cannot be accepted as satisfaction for the entire debt or payment. Most, if not all, concede that in that case it was dictum yet treat that case as authority for the so-called rule, are avowedly hostile and in an attempt to avoid its authority are driven to "artificial and technical distinctions". The dictum is considered the precedent of such force as to compel courts to pare it until each case is considered and adjudicated on the facts of the case then under review, precedents giving birth to

case law. The questions to be decided are upon what point of law was the Pinnel case decided and not of the many distinctions and differentations, what is left of the case and then why should not all courts be bold enough to disregard a disapproved rule.

Pinnel brought an action of debt on a bond against Cole, Cole (defendant) pleaded that at the instance of the plaintiff, before maturity he paid a lesser sum than due which the plaintiff accepted in full satisfaction. Lord Coke held that in that case acknowledgment of satisfaction by deed is a good bar without payment of anything. It has been held that agreements under seal would be a satisfaction, also payment at a different place, the gift of a horse, a hawk or robe would be satisfaction because of supposed benefits.

The Supreme Court of Mississippi has first boldly refused to follow the case or recognize the principle. Judge Woods said in *Clayton vs. Clark,* 74 Mississippi 499, 21st Southern 565, 22 Southern 189: "There Pinnel pleaded payment of the lesser sum before the date of the maturity of the greater sum, named in the bond and accepted by the creditor in full satisfaction and he lost, unhappy wretch that he was, born two or three centuries too soon and not knowing the difference between a legal tweedledum and a legal tweedledee because he pleaded that he paid a part of a greater original sum and that the plaintiff accepted it in full satisfaction and did not plead that he paid it in full satisfaction. The rule is found in Pinnel's case but it is bold dictum and as stated by Lord Blackburn in *Foakes vs. Beer,* before the House of Lords (9 App. Cas. 605) for the long period of 115 years after Pinnel's case was decided no cases had been found in which the question was raised whether payment of a lesser sum could be satisfaction of the liquidated demand."

In the case of *Foakes vs. Beer,* Lord Blackburn stated, "What principally weighs with me in thinking that Lord Coke made a mistake of fact is my conviction that all men of business whether merchants or tradesmen do every day recognize and act on the ground that prompt payment of a part of their demand may be more beneficial to them than it would be to insist on their rights and enforce payment of the whole. Even where the debtor is perfectly solvent and sure to pay the rest this often is so. Where the credit of the debtor is doubtful it must be more so". The point upon which the courts have agreed in adhering to the so-called rule, is that there must be a new consideration to support the payment of the lesser sum and anything that is accepted as of value will be sufficient.

In *Harper vs. Greham*, 20 Ohio 105, the opinion states, "The history of judicial decisions on the subject has shown a constant effort to escape from its absurdity and injustice. . . . . We see, then, that the payment of a less sum than is due the day before the debt falls due will discharge it; payment at another place than is stipulated will do so; the delivery of a collateral article of any value will do so; the acceptance of the debtor's note with security, the note of a third person, or even the negotiable note of the debtor himself will do so: and yet the payment of as much money in hand as is called for by such note will have no such effect although it is demonstrable that the utmost that the creditor can get from such a note cannot exceed in amount that which he gets in hand in the other case without trouble, delay or expense. It may seem to some persons, not having a great veneration for these institutions of antiquity for which no reason can be given, that a rule so effectually undermined and having neither rhyme nor reason to support it, ought to be at once overruled, and the whole matter placed upon the footing of reason and common sense, especially as the exigencies of modern commerce frequently compel the most deserving men, with the aid of friends, to compromise their debts for less than the amount due, an operation mutually beneficial to both debtor and creditor, as the creditor gets a part, where otherwise he would lose the whole, and the debtor is left free to commence again with the hope of better success. These considerations will necessarily arise whenever it becomes necessary to decide the general question. In this case we aspire to nothing higher than to follow in the footsteps of the sages of the law, and hold this one of the cases 'taken out of the rule' because the money by the original obligation was payable in Ohio, whereas the lesser sum of money was paid at another place, to-wit: in Arkansas".

And why may not men make and substitute a new contract and agreement for an old one, even if the old contract calls for a money payment? And why may one accept a horse worth $100 in full satisfaction of a promissory note for $1,000 and be bound thereby, and yet not be legally bound by his agreement to accept $999, and his actual acceptance of it, in full satisfaction of the $1,000 note? No reason can be assigned except that just adverted to, and this rests upon a mistake in fact. And a rule of law which declares that under no circumstances, however favorable and beneficial to the creditor or however hard and full of sacrifice to the debtor, can the payment of a less sum of money at the time and place stipulated in the original obli-

gation or afterwards, for a greater sum, though accepted by the creditor in full satisfaction of the whole debt, ever amount in law to satisfaction of the original debt, is absurd, irrational, unsupported by reason, and not founded in authority, as has been declared by courts of the highest respectability and of last resort, even when yielding reluctant assent to it.

It would be well to state just at this time why this rule is recognized as a binding force by many courts, it is, "The reason for the rule is that there is no consideration and such payment, the transaction being regarded as a mere *nudum pectum* and therefore void, that such payment is no consideration for a release of or an agreement to release the whole debt." It would be of interest to note the cases in which the court has held that the rule did not apply. But the rule and the reason are purely technical and often foster bad faith, for the history of the judicial decisions will be found to follow a constant effort to escape from its absurdity and injustice. *Brooks vs. White,* 2 Met. 37 Ame. Decisions 95, "It is rigid and unreasonable and defeats the clearly expressed intentions of the parties and therefore should not be extended to embrace cases not within the very letter of it". *Wescott vs. Waller,* 47 Ala. 492, *Johnson vs. Brannon,* 5 Johns 268, "and is not to be extended beyond its precise import and whenever the technical reason for its application does not exist it is not to be applied". *Brooks vs. White,* "The paring of this rule commenced in the Pinnel case when Lord Coke called acknowledgment by deed a good borrow without any payment." It has been held, that agreements under seal would be satisfaction, payment at a different place and anything which was supposed to be beneficial. The value of the satisfaction is not material.

The State of New York which adheres to the rule has easily destroyed its effect, "For an account of eight hundred dollars the creditor accepted one hundred dollars and balanced the account by the entry: 'Gift to balance account', and gave him his receipt in full. This was held a satisfaction". *Gray vs. Clarke,* 55 New York 68. 14 Ame. Reports 181. The New York Court found itself in good company for Mr. Baron Parke said, "It is clear that if the claim be liquidated and ascertained some payment of part cannot be satisfaction of the whole although it may under the circumstances be evidence of a gift of a remainder". *Sibree vs. Tuck,* 15 M. & W. 23, 15 L. J. Ex. 318. "There can be no question, then, as to the right legally to settle the remainder as a gift and the great solemnity and dignity at-

tached to the rule may, at his point, create a smile. The satisfaction by giving something of the pretended value and known to be a pretense has arisen and been adjudicated, though it would require consideration slightly of the ethics of the profession, but the lawyers were held blameless so long as they kept within the reasonable bounds." "Strange enough it seems long to have been thought that if the defendant kept within reasonable bounds neither he nor his lawyers were to blame in getting time in this way by the plea that a chattel was given and accepted in satisfaction of the debt. Recognized forms were given and accepted in satisfaction of a beaver hat." *Young vs. Rudd,* 5 Mod. 86, 3 Chitty's Pleading, 2 Edition 92, "None for a moment supposed that a beaver hat was really given and accepted but everyone knew that the law was that if it was really given it was a good satisfaction. *Foakes vs. Beer,* 1 Eng. Ruling Cases 370.

Again the slender thread that binds us to the rule is shown by Chief Justice Leroy (*The Corporation of Drogheda vs. Fairtlough,* 8 Ir. C. L. Rep. 98, 110, 114): "The payment merely of a less sum, not being in pursuance of any contract by deed can not by the common law be deemed to be a satisfaction of a greater liquidated sum, but the law will allow the payment of a smaller sum to be a satisfaction of a greater liquidated sum if there be any collateral advantage, however small to the creditor attending the transaction." (*Foakes vs. Beer.*) There must be some consideration for the relinquishment of the residue, something collateral to show a possibility of benefit to the party relinquishing his further claim. *Fitch vs. Sutton,* 5 Eastern 230-232. If a gift of the remainder be a subterfuge, how much less should we defend the reception of an article for the remainder which might possibly show some value. The gift and the article of possible value would alone make the rule valueless.

What has so far been said applies to liquidated claims. The weight of authority is that where principal and interest are due on a debt that the action cannot be pursued for the interest and especially where the principal is received in satisfaction. There is no controversy that the lessor sum may be accepted before maturity of the whole sum for perchance the money before maturity may be worth more to the creditor than at the maturity. This would particularly be true where the debtor is insolvent and all authorites are in accord as to the legality of the compromise. There are also cases which hold that the lesser sum may be paid if further security is given for a part of the debt due.

It has even been held that the surrender of a note is a sufficient discharge to part recovery of the part due. This is justified as being sufficient accord and satisfaction of the old debt. While the liquidated amount for money cannot be satisfied by a smaller sum of money it can be by any other personal property no matter what the value. This might afford a good market for lead pencils, usurping the prerogatives of the beggar to evade the law by allowing him to sell lead pencils and possibly shoe strings where the purchaser never takes the article that he has purchased, leaving it in the possession of the seller. Neither does he enter a contract of bailment with the seller. In disputed claims where the claim is not a money demand or if so is unliquidated or even if liquidated is doubtful in fact or law, any sum no matter how small will be accepted as a compromise to satisfy the rule.

Bull vs. Bull, 43 Conn. 455. "And the adequacy of the consideration will not be inquired into by a court of equity. And for the purpose of consideration no personal property except money has any value in law." *Bull vs. Bull,* 43 Conn. 455

Another exception generally acquiesced in and supported by the weight of authority is that of composition of the creditor on the theory that it is binding upon each for each in that case as the undertaking of the rest as a consideration of his undertaking.

Payment by a third party or an endorsement by a third party for this sum has been held to be a good accord and satisfaction.

The rule that payment of the lesser sum in satisfaction of a larger sum, is not binding, as want of consideration applies only where the larger sum is liquidated and when there is no consideration whatever for the surrender of a part of it; and the rule itself, is considered so far with disfavor as to be confined strictly to cases within it.

Chicago, M. & St. P. R. R. Co. vs. Clarke, 178 U. S. 353. 44 Law Edition 199. 20 Supreme Court Reporter 924. "So the rule is highly technical and not supported by reason." A slight consideration is therefore sufficient to defeat it.

First National Bank vs. Shook, 100 Tenn. 436. 45 S. W. 338. This brings us to a statement in *Brown vs. Kern,* 21 Wash. 211, 56 Pacific 798. "That the rule is not in accordance with sound ethics and it alludes to a general dissatisfaction of the courts with it and their tendency to restrict its operation wherever possible and their avidity to lay hold upon very slight circumstances for that purpose and that it might perhaps be better to change the rule in

a straight forward manner than to seek to destroy its operation by illogical discrepancies. Several states have acted in a straight forward manner and abrogated the rule by statute. Such states are Alabama, California, Georgia, Maine, North Carolina, South Dakota, Tennessee, Virginia and the Province of Ontario, Mississippi (*Clayton vs. Clarke,* 74 Miss. 510, 21 Southern 565.) and New Hampshire (*Frye vs. Hubbell,* 74 N. H. 358, 68 Atlantic 385) have declined to adopt or follow it." "The rule only applies when part payment is made in the same medium called for by the obligation." Missouri (*American Electric Company vs. Hamilton-Browne Shoe Company,* 165 Federal). "There is no question that insolvency of a debtor is sufficient to create an exception to the rule. Even where the debt is definitely secured it is held to be a good accord and satisfaction."

The many exceptions noted, the Rule in Pinnel's Case is almost a myth. It is as though a road were known more by its detours than the main highway and it would seem to be more straight forward and ethical for both Bench and Bar to discard what little remains of the rule in a straight forward manner than to indulge in acts which are recognized and designated as shams. With this in view there is little wonder that the laity charge us with being bound by precedents of no value and frequently obsolete.

The law encourages people to make contracts and to control such contracts and in this case there is no intimation of the interest of any third parties in the transaction, no possibility of its effects extending beyond those who are parties and makers of the contract. The law says emphatically to the contracting parties, "You have constructed something that you cannot legally destroy except by the original terms, but we will gladly permit any other terms which will destroy your own creation. You may control your own acts and your own property by going beyond the rule but if you do not go beyond the rule you must play the game according to the rule."

Dean Ames, in the Harvard Law Review, Vol. 2, page 555, subject, "Two Theories or Considerations" ably reviews all the cases and finds, "that the authority cannot be reconciled with any theory of consideration", and defines consideration as "any act or forbearance given in exchange for a promise". "This qualification, however, that for the present by an unfortunate and established anomaly is the creditor's promise in consideration of the payment of the whole as a part of the debt by a deed is invalid." That was written in 1899 and the unfortunate and established

anomaly established in 1602 is with us yet, condemned, discredited, until its imaged form is a sign post not to follow the wrong road. It may be that in cases of public contracts the rule might be well to be followed but malfeasance in office and fraud would be equally available. This rule founded in dictum, followed under protest, parted with cheerfully, has about vanished into thin air. If not, why not have a real legal interment and relieve the Bar and Bench of a discredited rule?

IS A NEGLIGENT DEFENDANT LIABLE FOR UNFORESEEABLE HARM PROXIMATELY ENSUING

By H. B. Schermehorn, Vanderbilt Law School

The English case, in re An Arbitration between Polemis and Another and Furness, Withy and Company, Limited,[1] presents in spectacular fashion an interesting and important question of tort liability, namely, whether the defendant, (assuming that he is liable at all for harm negligently inflicted) is liable for a harm that proximately ensues from his negligence, but which no reasonable man would have foreseen or expected as a kind of harm likely to ensue. Or, on the other hand, is the defendant liable for all harm proximately ensuing provided, also, it is a harm that should have been reasonably foreseeable. If the Court of King's Bench had applied the last mentioned rule in the above case, the damages would have been merely nominal. It applied the rule first mentioned, and the damages were in the neighborhood of $1,000,000. The facts of the case were these:

A freight steamer in the possession of the charterers, the defendants, was discharging cargo in port. A portion of the cargo in the lower hold consisted of a quantity of benzine or petrol in containers. To facilitate the discharge of the cargo a heavy plank had been laid across the deck hatchway, and the stevedores, servants of the charterers, in hoisting the cargo, negligently displaced this plank, which fell into the lower hold. The fall of the plank was instantly followed by an explosion and a rush of flames and the vessel became a total loss.

There had been some leakage of the benzine, in consequence of which the lower hold was more or less filled with benzine vapor, and the plank, in falling, must have caused two pieces of metal to strike together, producing a spark and igniting this vapor. The reported facts do not indicate that the charterers' servants had any notice of the presence of this benzine vapor in the hold, nor that they had any reason for using more care than is ordinarily used in handling cargo. The owners sued the charterers for the value of the steamer.

Three arbitrators, to whom under the terms of the char-

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1 1921, 3 K. B. 560.

ter party the case was referred, made the following findings of fact:

(a) That the ship was lost by fire.

(b) That the fire arose from a spark igniting petrol vapor in the hold.

(c) That the spark was caused by the falling board coming into contract with some substance in the hold.

(d) That the fall of the board was caused by the negligence of the Arabs engaged in the work of discharging.

(e) That the said Arabs were employed by the charterers or their agents the Cie. Transatlantique on behalf of the charterers, and that the said Arabs were the servants of the charterers.

(f) That the causing of the spark could not reasonably have been anticipated from the falling of the board, though some damage to the ship might reasonably have been anticipated.

(g) There was no evidence before us that the Arabs chosen were known or likely to be negligent.

(h) That the damages sustained by the owners through the said accident amounted to the sum of £196,165.

Subject to the opinion of the Court on any questions of law arising, the arbitrators awarded that the owners were entitled to recover from the charterers the before mentioned sum. If the Court should be of opinion that the above award was wrong, then the arbitrators awarded that the owners should recover nothing from the charterers.

This award was affirmed by Sankey, J. and the charterers appealed.

The charterers, defendants, contended that the damages must be such as can reasonably be anticipated as the result of the negligent act, citing the statement of Pollock, C. B., in *Greenland v. Chapin*:[1] "I entertain considerable doubt whether a person who is guilty of negligence is responsible for all the consequences which may under any circumstances arise, and in respect of mischief which could by no possibility have been foreseen, and which no reasonable person would have anticipated. Whenever that case shall arise, I shall certainly desire to hear it argued, and to consider whether the rule of law be not this: that a person is expected to anticipate and guard against all reasonable consequences, but that he is not, by the law of England, expected to anticipate and guard against that which no reasonable man would expect to occur". In *Rigby v.*

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[1] 5 Ex. 243. 248.

Hewitt,[1] Pollock, C. B., said: "I am disposed not quite to acquiesce to the full extent in the proposition, that a person is responsible for all the possible consequences of his negligence. I wish to guard against laying down the proposition so universally; but of this I am quite clear, that every person who does a wrong is at least responsible for all the mischievous consequences that may reasonably be expected to result, under ordinary circumstances, from such misconduct."

The owners, plaintiffs, maintained that while it was entirely proper, on the issue of whether a defendant was negligent, to consider what a reasonable person ought to have anticipated, yet, when he has been found to have been negligent, and the further question arises—for what consequences he shall be liable? he must be held for all damage directly flowing from his negligence, irrespective of its foreseeableness, citing *Smith v. London and Southwestern Railway,*[2] and *Weld-Blundell v. Stephens.*[3] In the last named case Lord Sumner says, p. 984: "What a defendant ought to have anticipated as a reasonable man is material when the question is whether or not he was guilty of negligence . . . . . This, however, goes to culpability, not to compensation."

The appeal was dismissed and the charterers were thus held liable for the value of the steamer, as found by the arbitrators. Bankes, L. J., approved the statement of Channell, B., in *Smith v. London and Southwestern Railway,* that "where there is no direct evidence of negligence, the question what a reasonable man might foresee is of importance in considering the question whether there is evidence for the jury of negligence or not . . . but when it has been once determined that there is evidence of negligence, the person guilty of it is equally liable for its consequences, whether he could have foreseen them or not". The Lord Justice concluded:

"In the present case the arbitrators have found as a fact that the falling of the plank was due to the negligence of the defendant's servants. The fire appears to me to have been directly caused by the falling of the plank. Under these circumstances, I consider that it is immaterial that the causing of the spark by the falling of the plank could not have been reasonably anticipated.

"The appellants counsel sought to draw a distinction be-

1 (1850) 5 Ex. 240, 243.
2 L. R. 6 C. P. 21.
3 (1920) A. C. 956, 983, 984.

tween the anticipation of the extent of damage resulting from a negligent act, and the anticipation of the type of damage resulting from such an act. He admitted that it could not lie in the mouth of a person whose negligent act had caused damage to say that he could not reasonably have foreseen the extent of the damage, but he contended that the negligent person was entitled to rely upon the fact that he could not reasonably have anticipated the type of damage which resulted from his negligent act. I do not think that the distinction can be admitted. Given the breach of duty which constitutes the negligence, and given the damage as a direct result of that negligence, the anticipations of the person whose negligent act has produced the damage appear to me to be irrelevant. I consider that the damages claimed are not too remote." Warrington, L. J., said: "The presence or absence of reasonable anticipation of damage determines the legal quality of the act as negligent or innocent. If it be thus determined to be negligent, then the question whether particular damages are recoverable depends only on the answer to the question whether they are the direct consequence of the act." And Scrutton, L. J., said: "It was negligent, in discharging cargo, to knock down the planks of the temporary staging, for they might easily cause some damage to either workmen, or cargo, or the ship. The fact that they did directly produce an unexpected result, a spark in an atmosphere of petrol vapor which caused a fire, does not relieve the person who was negligent from (responsibility for) the damage which his negligent act directly caused."

It is clear, therefore, that the judges in the Polemis Case were in entire accord as to the principle that, given a negligent act, the defendant is liable for an unforeseen and unforeseeable kind of harm proximately resulting therefrom. Beven[1] is of the same opinion, but Pollock[2] does not agree. This last named eminent authority, in the preface to the 12th Edition of his work on Torts (1923) has an interesting commentary upon this important case. He says: "Several pages (i. e. of the 12th Edition of his work on Torts) are now recast in consequence of the Court of Appeals decision in Polemis' Case (1921) 3 K. B. 560. It may seem presumptuous to be dissatisfied with the unanimous judgment of a strong Court, but I cannot help thinking that too much stress was laid on recent dicta of eminent

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1 Negligence in Law, 1, 106.
2 Pollock on Torts, 11th Ed. pp. 39, 40.

judges which were not strictly necessary for arriving at the results, and too little on the general, current of nineteenth century authorities. According to the ruling which now stands, namely, that liability for the consequences of a wrongful act or negligent default, once established as such, is not limited to consequences which might have been reasonably anticipated, it is certain that many reported cases which at the time were regarded as difficult might have been disposed of with much less trouble, and that many reasons given in considered judgments must henceforth be deemed to have been superfluous. We have yet to see how far the law laid down by the Court of Appeals will be accepted in independent jurisdictions."

In the 9th Edition of his work on Torts (1912) Pollock says, p. 32: "The view which I shall endeavor to justify is that, for the purpose of civil liability, those consequences, and those only, are deemed 'immediate', 'proximate', or 'natural and probable', which a person of average competence and knowledge, being in the like case with the person whose conduct is complained of, and having the like opportunities of observation, might be expected to foresee as likely to follow upon such conduct."

Sir John Salmond,[1] also dissents. In the preface to the Sixth Edition (1924) of his work on Torts, he says: "Since the last edition of this book the Court of Appeals in re Polemis and Furness, Withy & Co., (1921) 3 K. B. 560, has definitely rejected the view that liability for the consequences of a negligent act is limited to such consequences as are natural and probable—a view which was adopted, on apparently good authority and certainly in good company, in previous editions of this book." Salmond's treatment of the subject of remoteness of damage[2] will repay reading. He says, p. 138: "Until the recent decision of the Court of Appeals in (the Polemis Case) there was much apparently good authority for formulating the principle as follows: That a wrongdoer is liable only for damage which was intended by him or which, though not intended, was the natural and probable consequence of his wrongful act. On this principle every man is responsible for damage which he intended to result and which did result from his wrongful act, however, improbable it may have been, and every man is also responsible for the natural and probable results of his wrongful act, even though not intended by him; but no man is responsible for consequences neither intended nor

1 Salmond, The Law of Torts (6th Ed.) X.
2 Salmond, The Law of Torts (6th Ed.) 131-172.

probable. And a consequence is for this purpose natural and probable when it is so likely to result from the act that a reasonable man in the circumstances of the wrong doer, and with his knowledge and means of knowledge, would have foreseen it and abstained from the act accordingly."

After summarizing the facts and the decisions in the Polemis Case, Salmond makes, p. 142, this suggestive comment: "The decision (i. e. the Polemis Case) does not mean that a person is responsible for all the consequences of his wrongful act. It does not reject the rule as to remoteness of damage. It merely rejects as a test of remoteness the probability or the improbability of the consequences in question. But if this test is rejected, what is to be substituted as the true test? By what criterion is it now to be determined whether any consequence is so connected with the wrongful act as to be a ground of liability, or is on the other hand so remotely connected with it that no damages can be recovered in respect of it? On this difficult question there is little guidance to be obtained from any of the authorities. It must, since the definite rejection of the rule as to natural and probable consequences, be regarded as one of the unsettled questions of the law, and any attempt to formulate a definite and exhaustive answer to it must necessarily be merely speculative."

There is a sufficiently clear distinction between a difference between the varying degree or extent of harm of a certain kind, caused by a wrongful act, and the different kinds of harm which such an act may cause. The plaintiff has a vase on a stand close to the open window on a second floor. I negligently back against the stand, overturning it against the windowsill and knocking the vase out of the window, where it is shivered on the sidewalk. I am equally liable for the value of the vase, whether that value is five dollars or five thousand dollars.[1] But suppose before I came into the room the plaintiff had temporarily secreted a roll of bills in the vase to the amount of five thousand dollars, and that when the five dollar vase is shattered on the sidewalk, a passerby makes off with the roll, which is never recovered. Am I liable for the loss of the money? By the present rule of English law it would seem that I am. Modern American authorities appear to be

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1 Terre Haute & Ind. Ry. v. Buck, 96 Ind. 346; Beauchamp v. Saginaw Co., 50 Mich. 163; Watson v. Rinderknecht, 82 Minn. 235; Smith v. London & S. W. Ry. (1871) L. R. 6 C. P. 14, 22; France v. Gaudet, L. R. 6 Q. B. 199 (1871);

much divided,[1] but there is authority supporting the rule laid down in the Polemis Case.

In *Eten v. Luyster,*[2] the defendant wrongfully entered upon the plantiff's premises and tore down a barn. But in addition to the value of the premises destroyed, plaintiff claimed to recover for the consequent loss of $2,000.00, which he had secreted in a feed box in the barn. The New York Court of Appeals held such loss recoverable. "For all loss occasioned by the trespass, whether in the destruction of the chattels or the loss of money that was kept upon the premises, the plaintiff was entitled to recover. That the money was kept in an unusual place did not take it out of the protection of the law, or affect the liability of the defendants for their tort. They acted at their peril, and must respond for the consequences. The loss of the money, although the defendants may not have suspected its presence, was the direct and necessary consequence of the acts of the defendants."

That foreseeability of the specific harm which actually resulted is not an essential legal requisite to making out the existence of causal relation between defendant's negligence and plaintiff's damage, is established, also, in *Christianson v. Chicago, etc., Railway*[3] and other American cases.[4] The conclusion of Prof. Jeremiah Smith, in his able and exhaustive discussion of this question[5] is to the same effect. He says, at p. 226: "We submit that the probability or improbability of a result does not furnish a legal test of the existence of causative relation between defendant's tort and plaintiff's damage."

The rule established in the Polemis Case is approved by Beven[6] and Street[7] states that his own independent research corroborates Beven's conclusions. Prof. Bohlen[8] says: "This (negligence) once being admitted or established, the liability for injuries sustained is to be determined by the natural consequences, those resulting from the operation of the ordinary natural laws, animate and inanimate" . . . . . "The test of liability is no longer the foreseeable

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1 33 Yale Law Journal 276.
2 60 N. Y. 252 (1875).
3 67 Minn. 94, 69 N. W. 640.
4 See Stevens v. Dudley, 56 VI.-158; Chicago, etc. Ry. v. Stepp, 164 Fed. 785; Texas, etc. Ry. v. Carlin, 111 Fed. 777; Lawrence v. Heidbreder, etc. Co., 119 Mo. App. 316; 1 Sedgwick on Damages (9th Ed.) section 139-143.
5 Legal Cause in Actions in Tort, Prof. Jeremiah Smith, 25 Harvard Law Review 103, 223, 303.
6 1 Beven, Negligence in Law, 106.
7 1 Street on Foundations of Legal Liability, 88.
8 40 Am. Law Reg. (N. S.) 161.

probability, but an unbroken natural sequence of event.''

What are the arguments in favor of the milder rule of liability supported by Pollock and Salmond and countenanced by certain of the American cases, i. e. that the defendant is not to be held liable (in cases of negligence, at least) for unforeseeable harm proximately resulting?[1] Professor Smith[2] summarizes these as follows:

''First: The law ought to adopt a milder rule of determining the existence of causal relation in cases of negligence than in other torts. Second: Great hardship, and even ruin, might be occasioned to a negligent tort-feasor, if his liability were extended beyond reasonably foreseeable consequences.

''Third: There must be *some* legal test of the existence of causal relation. Probability is the only practicable working test. Hence it must be adhered to, even if it be admitted that it sometimes results in injustice to plaintiffs.''

The first two of these arguments are based upon the social or sociological expediency of limiting liability for negligent conduct—a question to be decided by the sense of the community rather than by abstract reasoning. In answer to the third it may be observed that the defendant, being in the wrong, is entitled to no special consideration and that, as between himself and an innocent plaintiff, it is more just that he, the defendant, should bear the loss.[3]

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1 Scheffer v. Railroad, 105 U. S. at p. 252.

2 Legal Cause in Actions in Tort, 25 Harvard Law Review 248.

3 Hoyt v. Jeffers, 30 Mich. 181; Lillibridge v. McCann, 117 Mich. 84, 75 N. W. 288, 41 L. R. A. 381; Fent v. Toledo, etc. Ry., 59 Ill., 349.

JUSTICES OF THE PEACE—RECENT TENDENCIES*

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The justice of the peace system exists today in every one of the forty-eight states. It was a product of a type of civilization in which such an arrangement for the trial of petty cases seemed appropriate. Increased population, the construction of modern highways, the development of means of rapid transportation and communication, the establishment of a more definite system of legal principles and rules —all these have contributed to remove the conditions that formerly made justices of the peace necessary in every community.

In recent years there has been much discussion and some action looking to the curtailment or the abolition of justices of the peace courts, but there has been little outright abolition of the justices courts in rural communities.[1] The decision of the Supreme Court of the United States in the *Tumey* case[2] has served to direct attention to the defects of the justice of the peace system.

An examination of the constitutions of the forty-eight states reveals the fact that the provisions concerning justices of the peace may be placed into reasonably definite classes, first, with respect to legislative control over the office as such, and secondly, with respect to legislative control over the jurisdiction of justices of the peace.[3]

The types of provisions relating to legislative control over the office of justice of the peace as such are (1) those which provide expressly that the judicial power shall be vested in designated courts of which the justice of the peace

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*From the American Political Science Review, November, 1928.

1 The Passing of the Justice of the Peace, 12 Virginia Law Register 110 (1926). County Government in Virginia, prepared by the N. Y. Bureau of Municipal Research, January 1927, pp. 48-50. Constitutional Convention Bulletins, Illinois, 1920, pp. 762-764. County Government and Administration in Iowa, Applied History, 1925, pp. 322-330.

2 Tumey v. Ohio, 47 Supreme Court 437 (U. S. 1927).

3 Chester H. Smith, The Justice of the Peace System in the United States. 15 California Law Review, 118-141 (1926-27).

is one,[4] (2) those which provide that the judicial power of the state shall be vested in such inferior courts as may be established by law, and in which the justice of the peace is not mentioned,[5] (3) those which provide that the judicial power of the state shall be vested in such courts as may be established by law, and further provide that a competent number of justices of the peace shall be appointed or elected,[6] (4) those which provide expressly for the justice of the peace as one of the courts of the state, but which provide further that the legislature may abolish the office of justice of the peace throughout the state.[7]

The types of provisions relating to legislative control over the jurisdiction of justices of the peace are (1) those which provide specifically the jurisdiction,[8] (2) those which provide that the legislature may fix the jurisdiction but not to exceed a specified limit which is expressly stated,[9] (3) those which provide specifically that the legislature may fix the jurisdiction,[10] (4) those which imply that the legislature may fix the jurisdiction.[11]

Some of the constitutional provisions in regard to jurisdiction fall in one classification for civil cases and another for criminal trials, but by and large, the classification here includes both types of jurisdiction.

To abolish outright, then the office of justice of the peace would require in most states a change in the constitution; in a minority of states this may be accomplished by legislative enactment. But no state has abolished the system throughout the state, and in only a few states has any serious suggestion been made to do so. In the Louisiana

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4 Ariz., Ark., Del., Fla., Ga., Idaho, Ill., Kans., Ky., Md., Mich., Minn., Miss., Mo., Mont., Nev., N. Mex., N. C., Okla., Oregon, S. D., Tennessee, Texas. Utah, Washington, W. Va., Wis., Wyoming.

5 California.

6 Ala., Colo., Conn., Iowa, Indiana, Maine, N. H., N. Y., Ohio, Pa., R. I., S. C., Vt.

7 La., Neb., N. J., N. D., Va. The North Dakota Constitution (1913), Sec. 112, reads: "The legislative assembly shall have power to abolish the office of justice of the peace and confer that jurisdiction upon judges of county courts or elsewhere." The Massachusetts Constitution (1780) contains provisions with reference to tenure of office (Ch. 111, Art. 111) and removals (Amdts., Art. XXXVII) of justices of the peace, and nothing more; on jurisdiction, see 3 Pick. (Mass.) 508 (1827).

8 Ala., Ark., Fla., Ga., Ia., Miss., N. M., N. C., N. D., Texas, West Virginia, Wyoming.

9 Ariz., Calif., Colo., Idaho, Michigan, Minn., Mont., Neb., Nev., N. H., S. C., S. D., Utah.

10 Conn., Del., Ill., Ind., Kans., Ky., La., Md., Mo., N. J., Okla., Oregon, Pa., R. I., Tenn., Va., Wash., Wis.

11 The office is created by constitutional provision, but no provision for jurisdiction in Maine, Mass., N. Y., Ohio, Vermont.

constitutional convention of 1921, an attempt was made to abolish the office throughout the state, but the argument that it was a poor man's court fulfilling the needs of rural communities prevailed; so instead of abolishing the justices courts a provision was adopted which give the legislature complete power over these courts, even the power to abolish them.

The question of fee compensation for minor courts has been the subject of legislation in some states. Justices of the peace in California are paid by salary,[12] All minor courts in Nevada and Arizona are on a salary basis.[13] By constitutional provision in Louisiana and South Carolina the justices receive a salary instead of fees in criminal cases.[14]

Legislatures have used indirect methods of impairing the jurisdiction of the justices of the peace, either by taking away from the justices practically all civil and criminal jurisdiction where the legislature is empowered to do so, or by creating other types of minor courts with concurrent jurisdiction with the justices of the peace.

There has been a tendency in recent years to establish municipal courts, small claims courts, and juvenile and domestic relations courts in towns and cities, with the result of reducing materially or abolishing the jurisdiction of justices of the peace.[15] These courts in some instances have jurisdiction over a considerable area adjacent to the town or city, or even throughout the county. Where county courts are established, they in some cases, entirely supersede justices of the peace courts; in most instances the county courts exist along side justices of the peace courts.

In Ohio the system of compensation whereby the remuneration of justices of the peace is directly dependent on the outcome of criminal cases before them was the subject of attack on constitutional grounds in the *Tumey* case. The result of the holding in that case is that a judge is disqualified for interest where he receives his fees only if the defendant is convicted.[16]

Apparently this decision has been largely responsible for two immediate results in Ohio, first the enactment of a statute designed to save to the justices of the peace their

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12 California Code of Civil Procedure (1915), Sec. 102 (b).

13 The Constitutionality of Fee Compensation for Courts, 36 Yale Law Journal, 1171-75 (1926-27).

14 Louisiana Constitution (1921), Section 50. South Carolina Constitution (1895), Art. 5, Section 20.

15 Reginald H. Smith, Justice and The Poor, (N. Y., 1919).

16 Tumey v. Ohio, 47 Supreme Court 437, decided March 7, 1927.

fees in spite of the holding in the *Tumey* case, and secondly, a definite move on the part of the bar of the state for the establishment of a system of uniform inferior courts.

Senate Bill No. 72, enacted by the 1927 session of the legislature, amends the Ohio General Code on the matter of fees for justices of the peace in criminal proceedings.[17] Under the terms of this act the justices of the peace are required to pay into the treasury of the county all fees collected in state criminal cases in which the magistrate has final jurisdiction. Once a month the magistrate and other officers receive as compensation from the county general fund an amount equal to the sum total of fees earned by them in such cases. It is doubtful whether the objection of the *Tumey* case is met by such an expedient.

A committee of the Ohio State Bar Association made a report on June 19, 1928, in which it recommends the passage of a bill by the legislature to create a rural court in each of the counties of the state.[18] In each county the Rural Court, a court of record, would succeed to the powers, duties and jurisdiction of justices of the peace.[19] The Rural Judge, who must be a practicing lawyer of three years experience, and one or more magistrates are to be elected in each county; the judge, by the electors of the county outside municipal court districts; the magistrates, by the electors of magisterial districts, each such district to contain eight thousand to eighteen thousand inhabitants. The only requirements for magistrates are that they must be of good moral character and electors of the magisterial districts. The judge, magistrates, and constables are to be paid by salary, all fees being paid into the general county fund. The seat of the Rural Court is to be at the county courthouse, although provision is made that the Rural Judge or a magistrate at the direction of the judge may hold court at any place in the rural district where so doing would contribute to the convenience of the parties or to the ends of justice. Under this plan the fee system would disappear, and if there were a real supervision of the magistrates by the Rural Judge, there are obvious merits in this proposed system of minor courts.

Something has already been done in Ohio toward replacing justices of the peace. Over a score of the large cities of Ohio have for many years had municipal courts which, generally speaking, have jurisdiction not only in the

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17 Laws of Ohio, 1927, p. 269.
18 Committee on Establishment of Uniform Inferior Courts.
19 Constitution of Ohio (1851), Art. 4, Sec. 9, as amended Sept. 3, 1912.

city where they sit, but also in the township or in a district composed of one or more townships; these courts exercise the jurisdiction usually held by justices of the peace.

In Virginia, cities, for the most part, are excluded from the jurisdiction of the county governments, and the problem of the justices of the peace is essentially rural in its nature. The constitution requires that "the General Assembly shall provide for the appointment or election and for the jurisdiction of such justices of the peace as the public interests may require",[20] and the usual system of justices of the peace courts has been established by legislation. Recent acts passed by the Virginia Assembly made a beginning toward reform in the justice of the peace system. The act establishing juvenile and domestic relations courts in cities of twenty-five thousand or more inhabitants, with concurrent jurisdiction with justices of the peace within and one mile beyond the corporate limits of the city,[21] and the act permitting counties to have trial justices appointed by the Circuit Court[22] are indicative of the trend in Virginia. Even more important in Virginia is the legislation of 1926 permitting the establishment for certain counties of courts with powers comparable to those of civil and police justices of the cities.[23] Chesterfield County has adopted the system provided for by the 1926 legislation. The trial justice appointed in this county holds weekly courts in several places in the county, and sits in the more sparsely settled portions once a month. The Virginia act of 1926 is optional and is unlikely to solve promptly the justice of the peace problem throughout the state.

A Kansas statute passed in 1927 establishes city courts in Kansas City to take over the jurisdiction of justices of the peace courts not only in the city but throughout the county in which that city is situated.[24] A statute of the same year provides for judges for every township located in a county having a population of one hundred thousand to one hundred twenty-five thousand inhabitants, and these judges have the jurisdiction formerly exercised by justices of the peace.[25] The act provides that justices of the peace of such townships shall have no jurisdiction over any case civil or criminal, "except in civil actions for the recovery

20 Constitution of Virginia (1902), Section 108.
21 General Laws of Virginia, 1923, Ch. 81.
22 Virginia Code, 1924, Sections 4988-4988 (29).
23 Acts of Virginia Assembly, 1926, p. 862, Ch. 511.
24 Laws of Kansas, 1927, Ch. 180.
25 Laws of Kansas, 1927, Ch. 182.

of money only where the amount claimed, exclusive of costs, does not exceed the sum of one dollar''.[26] The provisions of this act may be adopted by any cities of the first class, or by cities of the second class having over thirteen thousand inhabitants. The judges of these courts must be lawyers of five years practice.

In Mississippi a 1926 statute establishes a county court in each county having a population exceeding thirty-five thousand, or not having such a population, has an assessed valuation of real and personal property exceeding seventeen million dollars, and in either event having a municipality therein of five thousand or more inhabitants as shown by the federal census of 1920.[27] Any other county in the state may establish a county court. The judges of the county courts must have the qualifications required for judges of the circuit and chancery courts.

The Mississippi county courts have jurisdiction concurrent with justices of the peace in all matters, civil and criminal; they are given exclusively the jurisdiction heretofore exercised by justices of the peace in eminent domain, the partition of personal property, and in actions of unlawful entry and detainer. In addition, the county courts have concurrent jurisdiction with the circuit court in misdemeanor cases, and concurrent jurisdiction with circuit and chancery courts in all cases where the principal amount involved is one thousand dollars or less, excluding divorce and alimony, matters testamentary and of administration, minors' business, cases of idiocy, lunacy, and persons of unsound mind.

Ten of the eighty-two counties of Mississippi come within the classification in which the establishment of the county court is made mandatory. Three other counties have by election adopted the system, while three counties on election rejected the proposal to establish county courts.[28] The Mississippi county courts take a good part of the work from justices of the peace. It is believed that if the court held sessions in each of the five supervisor's districts of the county, instead of at the county courthouse alone, the court would rapidly supplant the justices of the peace.

In Wisconsin, although there has been no amendment of

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26 In re Greer (1879) 58 Kans. 268, 48 Pac. 950 the constitutionality of a similar statute was upheld. But see *contra*, St. ex. rel. Burke v. Hinkel (1911), 144, Wis. 444, 129 N. W. 393.

27 Laws of Mississippi, 1926, Ch. 131.

28 Biennial Report of the Secretary of State of Mississippi (1926-27), pp. 156-157; figures are of May 31, 1927.

statutes relating directly to justice of the peace courts since the Code of 1898, nevertheless these courts have gradually lost much of their former importance. This has been accomplished in part by the creation of special municipal courts and, in other cases, by conferring much of the statutory jurisdiction of the justice of the peace upon county courts. The acts creating county courts frequently deprive the justices of the peace of a given county of all criminal jurisdiction and frequently, also, of most of their civil jurisdiction. In Milwaukee County, by special statute, there is only one justice of the peace, and he has been deprived of practically all jurisdiction, though he retains the right to perform marriage ceremonies. A special district court has been created for Milwaukee County, with substantially the criminal jurisdiction of the old justices of the peace courts, and a number of special civil courts set up in the county have relieved the justices of their civil jurisdiction. There are also in Wisconsin thirty-four municipal courts and two superior courts, with jurisdiction co-extensive with justices of the peace. In the greater part of the state, however, the old system of justices of the peace remains in effect in Wisconsin.[29]

In Maryland a 1927 statute provides for legally trained judges to serve as justices of the peace for Allegheny County. Two courts, known as "The Peoples' Court", have been provided; they have jurisdiction over minor criminal matters and in civil cases involving not over three hundred dollars.[30]

The system of minor courts existing in Hawaii is of interest. The Organic Act vests the judicial power of the territory in "one Supreme Court, circuit court, and in such inferior courts as the legislature may from time to time establish".[31] Twenty-seven judicial districts are established.[32] The Chief Justice of the Supreme Court of the territory appoints one or more magistrates for each judicial district. They must be lawyers. They may be removed by the Supreme Court. The magistrates have exclusive jurisdiction in civil matters involving amounts up to fifty dollars, and concurrent jurisdiction with the circuit courts in cases involving amounts up to five hundred dollars. Their criminal jurisdiction extends to offenses punishable by fine or by

29 Wisconsin Statutes, 1927. Vol. 1, Chapters 253 and 254; Laws of Wisconsin, 1909, Ch. 549; Laws of Wisconsin, 1913, Ch. 702.
30 Laws of Maryland, 1927, pp. 521-530.
31 The Organic Act, Chapter IV, Section 81.
32 Revised Laws of Hawaii, 1925, Vol. 1, Chapters 14 and 137.

fine and imprisonment not exceeding one year. Each magistrate must make an annual report to the Chief Justice of the Supreme Court of the territory. The magistrate of the Honolulu district receives an annual salary of forty-eight hundred dollars; the other twenty-six districts, with four exceptions, pay an annual salary of twelve hundred dollars or more.

Three methods of solving the justice of the peace situation present themselves: (1) the office may be abolished outright, or (2) other types of minor courts may be created alongside the justices of the peace courts, with similar jurisdiction to that exercised by the justices of the peace, or (3) there may be a limitation of the number of justices and the abolition of the fee system. Abolition of the office of justice of the peace may be accomplished by (1) constitutional provision abolishing directly the office, (2) constitutional provision or amendment authorizing the legislature to abolish the office, followed by proper legislative enactment, (3) legislation abolishing the office, in the few states where under present constitutional provision that is possible, (4) legislation taking away all, or practically all, jurisdiction and vesting such jurisdiction in other courts. This fourth method of indirect replacement is now being actively employed, but justices of the peace are likely to continue in most of the states, and the evils of the justice system in such states may largely be met by abolishing the fee system, reducing the number and jurisdiction of justices, and by setting up a more adequate judicial organization for small cases.

THE SIGN STATUTE IN MISSISSIPPI*

By W. A. Schmitt

Due to the fact that very few states have a similar law, and to the further fact of seeming inconsistency as far as results with the prevailing law in this state, a study of the Mississippi Sign Statute (Section 1300 Code of 1880; Section 4784 Code of 1906; Section 3128 Hemingway's Code 1917) may not be without interest and instruction. That some phase of it has been touched upon by the Supreme Court in fifty cases, and the Federal Courts for the Districts of Mississippi in eight cases during its comparatively short existence illustrates its importance in our business life. More than a hundred times Bankruptcy Courts have been called upon to decide titles to property according to this statute, frequently involving property worth thousands of dollars. With the advent of the automobile and elaborate refreshment parlors it will doubtless be productive of increasing litigation.

The law, which first made its appearance in Mississippi in 1880 in Campbell's Code, as an added paragraph to Chapter 49 which is the Act for the Prevention of Frauds and Perjuries, is as follows: "If any person shall transact business as a trader or otherwise, with the addition of the words 'agent', 'factor', 'and company', or 'and Co.', or like words, and fail to disclose the name of his principal or partner by a sign in letters easy to be read, placed conspicuously at the house where such business is transacted, or if any person shall transact business in his own name, without any such addition, all of the property, stock, money and choses in action, used or acquired in such business shall, as to the creditors of any such person, be liable for his debts, and be, in all respects, treated in favor of his creditors as his property."

This statute was evidently a copy of the Act of 1839 passed in Virginia, or at least from the same source, and is identical with the exception that notice must be published for two weeks in a newspaper under the Virginia law, and there it merely says that the property shall "be liable for the debts of such person". The statute of West Virginia

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is similar (and that of Maryland since 1922). No other state apears to have such a law.

It did not take long for the law to get in operation. Less than nineteen days after the Code went into effect the facts of the case of *Gumbel vs. Koon,* 59 Miss. 264 developed. There the Court said: "The defendant, Bluffington, transacted 'business as a trader or otherwise', and had a place of business, and the property levied on was 'acquired in such business'; and the appellee was the creditor of Bluffington, who had failed to 'disclose the name of his principal or partner by a sign and letters easy to be read, placed conspicuously at the house where such business is transacted'." "As to the creditors of Bluffington, whether they were antecedent or subsequent creditors, whether with or without notice of the fact that he was but an agent of another, whether they did or did not extend credit to him in the business or on the faith of his apparent ownership of the property, the property under this statute was his, and subject to their demands. The appellee was a creditor of Bluffington, and had the right to subject to the payment of his judgment the property levied on, to the exclusion of the rights of the appellant, as principal and owner, if he was such a principal, and to the exclusion of his rights as partner, if he was a partner. The subject of the statute was to prevent the assertion of secret claims to property, as against creditors of the person who seemed to be the owner of it, as evidenced by his dealings with it; and it conclusively fixes the ownership to be in the person whose sign is exhibited at the place where the business is conducted or who, in the absence of any sign, is the manager of the business."

In accord with the rulings of other jurisdiction,[1] it has been held that the statute only applied to "traders", and that a saw mill and a gin did not come under that head.[2]

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1 Keeper of a restaurant not a "trader". Swift & Co. (N. C.) 101 S. E. 87; 1 A. L. R. 1581. Nor a livery stable, Gallagher v. De Lancey Stables Co., 158 F. 381. Nor a hotel, boarding and rooming house. State Bank v. Marshall 163 Ark., 566; 260 S. W. 431; 34 A. L. R. 202. There is a division as to a saloon (not in Mississippi because of Howe v. Keer, *infra* and Carberry v. Burns, 68 M. 573 and Quin v. Myles, 59 M. 375) but since the Volstead Act this is now moot. Also a pool and billiard hall does not come within the classification. The words "or otherwise" in the phrase "transact business as a trader or otherwise" did not create an ambiguity sufficient to confuse the Court.

2 Yale v. Taylor, 63 Miss. 598. Probably the best definition is in Merchants Bank v. Schaaf, 108 Miss. 121; 66 So. 402, where among many citations, it is said "a trader is one who is engaged in trade; or, commerce; one who makes it a business to buy, sell or exchange goods; one who has transactions as a dealer in bartering and trafficking".

A hotel proprietor or a restaurant and boarding house keeper are not considered as traders.[3] The same was said of an insurance agency,[4] and to the same effect is a planing mill,[5] in which the Court said it was controlled by the case of *Yale v. Manufacturing Company* cited in the foot notes. It was intimated in an early case[6] that a factor or an auctioneer would not come within the statute, but here the firm dealt in the sale of live-stock and a jury passed on whether the property was used and acquired in its business and as a part of its general stock. More recently, two cases have arisen in which,[7] while the firm was engaged in different branches of business, they were separate, and one part of the business was held not to come within Section 1300.

At least twice it has been decided that property merely stored with the merchant or trader could not be subjected to his debts;[8] and if the property was procured by fraud and strategem, trespass or larceny, if the party, seasonably and in good faith asserts his title he may rescind the sale and recover it.[9]

On several occasions it has been held that the statute fixed the ownership in the property, but that it had no place in a contest between creditors of the common debtor who used or acquired the property which is the subject of the contest;[10] that it does not derange the order of priority

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3 Oliver v. Ferguson, 112 Miss. 521; 73 So. 569; John Van Range Co. v. Allan, 30 So. 499.

4 Lyons v. Steele & Co., 86 Miss. 261; 38 So. 371.

5 Willis v. Manufacturing Groc. Co., 19 So. 101.

6 Shannon v. Blum, 60 Miss. 828.

7 Orr v. Jackson Jitney Co., 115 Miss. 140; 75 So. 745. Sayers v. Scoville, 89 So. 917. In the first case the Jitney Co., operated a taxi service, and also traded in auto supplies, and the retained title to the jitney bus was upheld. In the latter case, the firm was principally engaged in the undertaking business, although it sold furniture and coffins, and the retained title to the hearse bus was held valid against creditors.

It is interesting to note that in the very first case Cooper, J., makes the statement that "at an early date in the history of this State it was settled by this Court that no exception would be engrafted on the statute. To this rule of construction we have steadily adhered". He was referring to the Chapter on Prevention of Fraud and Perjuries, and evidently overlooked the fact that the addition of the Sign section had just been made. Judge Truly, speaking for the Court in Meridian Land & Industrial Co. v. Ormand, 82 Miss. 758; 35 So. 179 said: "A remedial statute must be liberally construed. Where its meaning and intent are plain, courts will not permit its force to be weakened—its scope limited—on account of possible verbal inaccuracies." The West Virginia courts say that since it is in derogation of common law rights of property it should be strictly construed. Cable Co. v. Matthews, 72 West Va. 807; 79 S. E. 1079. While in Virginia it has varied from one to the other. 14 Va. Law Review 498.

8 Halls Cotton Gin Co. v. Berg, 65 Miss. 184; 3 So. 372; Burwell v. Herron, 16 So. 356.

9 Frank v. Roberson, 65 Miss. 162; 30 So. 253.

10 Kinney v. Paine, 68 Miss. 258; 8. So. 747.

among creditors of a person transacting business. The property made liable for his debts is to be subjected in the order of precedence fixed by law independently of Section 1300.[11] Also, that it matters not whether the debts were antecedent or subsequent to the inauguration of the business—or whether the creditor was misled or not.[12]

Perhaps the most important word in the statute is "transact", and it has served as a guide in quite a few decisions. The fact that the husband, the former owner and operator, had taken a position that caused him to be out of town most of the time, and when at home he did not always stay at the store, may show that he did not transact the business.[13] In another case it was said that though the husband acted as manager, he having owned the business when it was operated in another city,[14] he did not transact it; and in several cases it has been held that one had to be more than a mere clerk in the establishment to invoke the rule,[15] even though one had formerly owned the business. Merely "conducting" the business does not necessarily mean "transacting" it;[16] and where the husband was the head clerk but the real owners also gave the business their time and attention, it was held that as the entire management and control was not entrusted to him, he was not the ostensible owner transacting the business.[17]

Of similar importance are the words "used" and "acquired". It has already been shown that stored property, or stolen property, and probably borrowed property (if not the subject of re-sale) do not come within the class. "The word 'acquired' means obtained, procured, to get as one's own."[18] Judge Cooper in *Hall v. Berg,* 65 Miss. 184 observed: "Neither the letter nor the spirit of the statute finds application under the circumstances disclosed by the record. The gins were neither 'acquired' nor 'used' by

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11 Dodds v. Pratt, 64 Miss. 123.

12 Quin v. Myles, *supra;* Gumbel v. Keen, *supra;* but see expression by Judge Ethridge in Rubenstein v. Lynchburg Shoe Co., 88 So. 514. Recordation might modify the situation, as developed in these early cases.

13 Whittington v. Yazoo Delta Mortgage Co., 114 So. 752.

14 Rubenstein v. Lynchburg Shoe Co., *supra.*

15 Carberry v. Burns, *supra;* Bufkin v. Lyon, 68 Miss. 255, 10 So. 38.

16 Harris v. Roberson, 68 Miss., 506; 9 So. 829.

17 Robinson Co. v. Godsey, 111 Miss. 171; 71 So. 312. Albin v. Howard, 20 So. 844. In Hamblett v. Steen, 65 Miss. 474, 4 So. 432, the husband was in active charge, but the wife owned the property, took out the lease and license in her name, and the books were kept in her name. While it was held he was the ostensible owner, a dissenting opinion expressed doubt as to who really transacted the business. See also Wolf v. Kahn, 62 Miss. 814.

18 Meridian Land & Industrial Co. v. Ormand, *supra;* Burwell v. Harris, 16 So. 356.

the company in the business transacted by it. They were, it is true, in the possession of the company, and third persons may have been induced to give credit upon the faith that it had title to them; but the presumption of ownership arising from the possession of personal property is not conclusive unless made so by statute. . . . . But where as in this case, the trader neither 'acquired' any interest in the property, nor a right to 'use' it in his business, the mere fact of possession even though it be one permitted by the owner, is not effectual to bring the property within the operation of the statute."

Of course, actual or constructive possession of the property is essential to subject it to the debts of the ostensible owner.[19]

Very naturally in dealing in what is commonly known as the Sign Statute an inquiry into what is required as to signs is in order. Very little. If the sign reads "agent", or "factor", or "company", unless the name of the principal is disclosed, that principal loses all interest in the property as far as creditors of the person who transacts the business or concern. But if anyone transacts business in his own name he can do as he pleases,[20] but all of the property in the store is liable to his creditors for his debts. It is not necessary to post a sign. Ownership is not fixed in the person whose name appears on the sign, when the sign has no connection with the business and is not used as an advertisement thereof.[21] The one who transacts business is the owner. And in *Loeb v. Martin*, 63 Miss. 280 it was said: "The statute does not make the sign the test of ownership, but has regard to who transacts the business and deals with the property as apparent owner, and stamps it as his for the purpose of liability to his creditor. Signs may deceive and mislead, but there is little difficulty in determining who transacts the business as to property,

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Other cases bearing on the Sign Statute not cited in this article are: Adams v. Berg, 65 Miss. 3; 3 So. 465. Adams v. Berg, 67 Miss. 234; 7 So. 225. Durham v. Slidewell Liquor Co., 94 Miss. 140, 49 So. 739. Hobbs v. Herman Gro., 113 Miss. 332; 74 So. 26. Carnaggio Bros. v. Greenwood, 108 So. 141. Columbus Buggy Co. v. Turley, 73 Miss. 529; 19 So. 232; 32 L. R. A. 260. Gillaspy v. Harvester Co., 109 Miss. 136; 67 So. 904. Loeb v. Martin, 63 Miss. 280; Payne v. Hall Safe Co., 64 Miss. 175. Dale v. Harrihan, 85 Miss. 49. Hunter v. Forrest, 115 Miss. 7. Bates v. Nichols, 11 So. 109. Evans v. Hanley, 66 Miss. 148. Head v. Haycock Car Co., 16 So. 420. Citizens Bank v. Studebaker, 71 Miss. 544. Cotton Gin Co. v. Berg, 65 Miss. 184. Payne Co v. International Harvester Co., 110 Miss. 783; 70 So. 892. Fisher Co. v. Lowenberg, 116 So. 730.

19 Longino v. Delta Bank, 76 Miss. 395; 24 So. 901.

20 Schoolfield v. Wilkins, 60 Miss. 238.

21 Wolf v. Kahn, 62 Miss. 814.

and, without regard to the sign, the question is, Who transacted the business with the property?''

Coming now to consider the efficacy of recordation as tending to soften the harshness of the statute we find the few cases holding that if the instrument retaining the lien or security is properly filed for record the property cannot be touched by creditors.[22] It is said that when the instrument is recorded, the secret liens and fraudulent purpose which were the raison d'etre of the statute, are excluded. The reasoning is not altogether satisfactory. There is no specific statute covering recordation which would categorically make section 1300 inoperative.[23] And under the

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22 Tufts v. Stone, 70 Miss. 54; 11 So. 792. Gayden v. Tufts, 68 Miss. 691; 10 So. 53. Fitzgerald v. American Mfg. Co., 114 Miss. 580; 75 So. 440. Orr v. Jackson Jitney Co., *supra*. Dodds v. Pratt (Deed of trust recorded).

23 Sec. 2291 Hemingway's 1917 Code (2787 Code 1906) ''Conveyances, mortgages void if not lodged for record.—All bargains and sales, and all other conveyances whatsoever of land, whether made for passing an estate of free hold or inheritance, or for a term of years; and all instruments of settlements upon marriage, whenever land, money or other personalty should be settled or covenanted to be left or paid at the death of the party or otherwise; and all deeds of trust and mortgages whatsoever, shall be void as to all creditors and subsequent purchasers for valuable consideration without notice, unless they be acknowledged or proved and lodged with the clerk of the Chancery Court of the proper county to be recorded in the same manner that other conveyances are required to be acknowledged or proved and recorded; but the same is between the parties and their heirs, and as to all subsequent purchasers with notice or with valuable consideration, shall nevertheless be valid and binding.''

Sec. 2289 Hemingway's Code 1917 (2785 Code of 1906) Where Conveyances of Personal Property Recorded. ''Every writing respecting the title to personal property which by law ought to be recorded, shall be recorded in the office of the clerk of the Chancery Court of the County in which such property may remain, and if, afterwards, the person claiming title under such writing shall permit any other person, in whose possession the property might be, to remove the same, or any part thereof, out of the county in which the writing is recorded, and shall not within twelve months after such removal, cause the writing to be duly certified to the county into which the property may be removed, and to be delivered to the clerk of the chancery court to be recorded, the writing, for so long as it remained without being recorded or delivered for record in the last mentioned county, and for so much of the property as may be removed, shall be void as to all purchasers for a valuable consideration without notice, and as to all creditors.'' Section 3121 Hemingway's Code 1917 (4777 Code of 1906) Fraudulent Loans of Goods. ''And in like manner, where any loans of goods and chattels shall be pretended to be made to a person with whom, or those claiming under him, possession shall have remained for the space of three years without demand made and pursued by due course of law on the part of the pretended lender, or where any reservation or limitation shall be pretended to be made of a use or property by way of condition, reversion or remainder, or otherwise in goods or chattels, the possession whereof shall have so remained in another for said time, the same shall be taken as to creditors and purchasers of the persons so remaining in possession, to be fraudulent within this statute, and that the absolute property is with the possession; unless such loan, reservation, or limitation or use or property were declared by will or by writing, proved or acknowledged, and filed for record.'' (Section 3122 states that part of this does not apply to debts contracted subsequently.)

decisions of this state it is not necessary (quere as to traders) to record a retained title.[24]

In Virginia, the State of the parent statute presumably, it appears that recordation does not save the property,[25] and that registry statutes come in a different category. The Trader's Act deals with "shifting stocks", for "daily indiscriminate sales" and "impossible of continued accurate description", it was said, which raise a doubt as to the application in case of some immovable or unsalable article or fixtures.[26] This question must be definitely settled sooner or later because conflicting claims will certainly arise between lien-holder, such as hold under a chattel mortgage, conditional sales contracts and the like, and judgment creditors or trustees in bankruptcy. A distinction has been attempted to the effect that it is not the nature of the chattel, but rather the nature of the business and the purpose for which the chattel is used, and as to property of a different nature and kind from that displayed by the trader for re-sale, the registration will take it out of the statute.

The recent case of *Finance & Guaranty Co. v. Oppenheimer,* trustee, decided January 23, 1928, by the United States Supreme Court, through Mr. Justice Holmes, overruling the Circuit Court of Appeals for the Fourth Circuit (reported in 4 American Bankruptcy Review, 165), throws some interesting light on the question. Four automobiles were sold to the bankrupt under a duly recorded contract of conditional sale. Ten days before bankruptcy the vendor repossessed the cars, and the trustee brought suit about a year later, under the Trader's Act, to recover. The Court held that the lien of the trustee did not arise until after the property had come back into the hands of the vendor, which reserved title to itself. Therefore the re-taking was valid against him and unless he represented a claim that was

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24 Harrison v. Broadway Motor Co., 91 So. 453. Here it was held a Tennessee seller of an automobile with retained title, though not recorded in either state, may recover possession in this state as against a subsequent innocent purchaser for value without notice; except where seller authorizes, express or implied, a re-sale by vendee. Commenting on Columbus Buggy Co. v. Turley, *supra,* the Court said: "The seller conferred the right upon purchaser, the buggy company, to resell the buggies to the public, and thus having authorized the sale, the owner by virtue of a retained title, could not assert his right of title as against a bona fide purchaser from the Buggy Company."; but did not refer to the Sign Statute upon which that case revolved.

25 See Scope of Trader's Act, by J. F. Minor, 13 Va. Law Register 172, citing many cases, especially Partlow v. Lickliter, 100 Va. 631; 42 S. E. 671.

26 Walton v. Walter Fisher Co., 111 So. 364 holds that the Bulk Sales Law (Hem. Code Sec. 3129) applies to fixtures as well as merchandise, but this seems unsound.

paramount when the property was seized, it could not work a preference. The vendor had a right to take its own from the vendee. And no creditor not having a judgment or other lien could have complained under the laws of Virginia. (But what about a person holding such a claim?)

The case of *Capitol Motor Co. v. Lasker,* 138 Va. 630 was cited as authority that "creditors" within the purview of the Trader's Act means "lien creditors", that is, persons who have liens upon the property. This has not been decided in Mississippi (and in Virginia until this case, the trend appeared to be the other way), and whether the fact that the Sign Statute here has the added words "and be, in all respects, treated in favor of his creditors as his property" would change the construction is uncertain, except as far as the case of *Burks v. Moody,* 141 Miss. 370; 107 So. 229 may affect it.

"HAS THE SENATE OF THE UNITED STATES THE CONSTITUTIONAL RIGHT TO REFUSE TO SEAT A SENATOR WHO PRESENTS PROPER CREDENTIALS FROM THE STATE AUTHORITIES SHOWING HIS DUE ELECTION TO THE UNITED STATES SENATE?"

By Conwell Shoup Sykes

INTRODUCTION

The above statement of the subject upon which this paper is to be based presents two questions, each of which should be considered and answered separately. The first question raised is whether or not the United States Senate has the constitutional right to refuse to seat a senator who presents proper credentials from state authorities showing his due election to the Senate, in cases where that senator fails to possess the constitutional qualifications defined for senators in Article 1, Section 3, Paragraph 3 of the Federal Constitution. This section provides that "No person shall be a senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state for which he shall be chosen". There can be no doubt that the Senate does have such a constitutional right, because Article 1, Section 5, Paragraph 1, expressly provides that "Each house shall be the judge of the elections, returns, and qualifications of its own members, and a majority of each shall constitute a quorum to do business . . .". It is apparent without argument that under this section the Senate has the constitutional right to refuse to seat a duly elected senator if he fails to possess the constitutional qualifications heretofore set out, because that body is thereby made the sole judge of the elections, returns and qualifications of its members. To substantiate the above statements, reference need only be made to the fact that in numerous instances the Senate has exercised this power, and in not a single case has its constitutional right to do so been questioned.

The second question presented by the subject is whether or not the Senate has the constitutional right to refuse to seat a duly elected senator who, although he possesses the constitutional qualifications, yet fails to possess proper

mental or moral qualifications. This is a question about which there exists a great difference of opinion. One line of reasoning is that the Senate in refusing to seat a senator is limited to a consideration of whether or not he possesses the three constitutional qualifications. The advocates of this line of reasoning might be termed strict constructionists of the Federal Constitution. The other line of reasoning is to the effect that the Senate is not so limited, and that it has the constitutional right to exclude a duly elected senator if he fails to possess proper mental or moral qualifications. In contrast to the strict constructionists, the advocates of this second line of reasoning might be called liberal constructionists. While there is much to be said in favor of the first viewpoint outlined above, the writer feels forced to agree with the views of the so-called liberal constructionists, because he believes that their position is best supported by a reasonable construction of the applicable constitutional sections, by precedent in both the Senate and the House of Representatives, and furthermore, by practical results in maintaining the honor and integrity of the Senate. Consequently, this paper shall be devoted to establishing the proposition that the Senate has the constitutional right to refuse to seat a duly elected senator, when he lacks the proper mental or moral qualifications.

The United States Senate has adopted the view advocated by the so-called liberal constructionists, as evidenced by its action in refusing to seat Senators-elect Frank Smith of Illinois, and William Vare of Pennsylvania, not on the ground that they were not duly elected, nor that they did not possess the requisite constitutional qualifications, but solely on the ground that their tremendous campaign expenditures disqualified them for seats in the Senate, in that such excessive expenditures had tainted their elections with corruptness and fraud, and consequently, marked them as unfit to become United States Senators. Since the cases of Smith and Vare are the most outstanding examples of the Senate's refusing to seat a duly elected senator for disqualifications other than the three constitutional disqualifications, this paper will be confined to a discussion of these two cases. If the Senate's action in the Smith-Vare controversies can be justified, then the proposition that the Senate has the constitutional right to refuse to seat a duly elected senator when he lacks the proper mental or moral qualifications will have been established clearly and indubitably. Before proceeding further with this discussion, it would be profitable to investigate the facts concerned in the Smith-Vare controversy, and thereby see just what the United

States Senate had before it for consideration when it denied seats to Smith and Vare.

FACTS CONCERNED IN THE SMITH-VARE CONTROVERSY

ONE—FRANK SMITH OF ILLINOIS

On April 13, 1926, the Republican and Democratic primaries were held in Illinois to select the candidates of those respective parties for the United States Senate. The Republican primary resulted in the selection of Frank Smith over his opponent, William McKinley. George Brennan received the Democratic nomination, having been unopposed. In the primary election, McKinley expended $514,143; Smith $458,732; and Brennan $20,481. Previous to and at the time of the primary election, Smith was Chairman of the Illinois Commerce Commission, which as part of its functions, had complete control and regulation of the public utilities in Illinois. Samuel Insull, who at the time of the primary election, was responsible for and the manager of an investment in public utilities in Illinois approximating the sum of six hundred and fifty million dollars, contributed $157,925 to the campaign fund of Smith. At the time this contribution was made, Illinois had a law found in the Statutes of the State of Illinois, page 2677, which provided in reference to the Illinois Commerce Commission that "No commissioner, assistant commissioner, secretary, or person appointed or employed by the commission shall solicit or accept any gift, gratuity, emolument, or employment from any person or corporation subject to the supervision of the commission". The report of the Senate Committee investigating the Smith-Vare elections brought out clearly the fact that while a part of Smith's campaign expenses were used to educate the voters by far the larger part was used to buy votes and to establish and maintain the supremacy of his political machine.

On November 2, 1926, Smith was elected United States Senator from Illinois over his Democratic opponent, Brennan. Due to the death of Senator McKinley, from Illinois, on December 7, 1926, Governor Small, of Illinois, on December 16th, appointed Smith to fill the unexpired term of McKinley, which term was to run until March 4, 1927. The Senate, on January 20, 1927, refused to accept the credentials of Smith as Senator from Illinois to fill McKinley's unexpired term, and resolved that until the Committee on

Privileges and Elections should render its report on Smith, he should be denied the oath of office and refused a seat in the Senate. The Senate based its action on the excessive campaign expenditures of Smith. The 69th Congress adjourned March 4, 1927, without Smith ever having been permitted to take his seat in the Senate.

On March 3, 1927, the credentials of Smith as senator-elect from Illinois were presented to the Senate, and were referred to the Committee on Privileges and Elections. When Congress reconvened in December, 1927, that Committee reported unfavorable on the credentials of Smith. A few days later the Senate, by a vote of 64 to 32, determined not to give Smith the oath of office or to permit him to take his seat, on the ground that his excessive campaign expenditures had corrupted his election, and that he was, therefore, disqualified from becoming a senator.

TWO—WILLIAM VARE OF PENNSYLVANIA

The Republican and Democratic senatorial primaries were held in Pennsylvania on May 18, 1926. William Vare was selected as the Republican candidate over his opponents, George Pepper and Gifford Pinchot, while William Wilson, being unopposed, received the Democratic nomination. In that senatorial primary, Pepper expended $1,804,979; Vare $785,934; Pinchot $187,029; and Wilson $10,088. Just as in the case of Smith, of Illinois, according to the Senate Committee's report, part of these campaign expenditures went towards educating the voters, but by far the greater part went towards the purchase of votes and other illegal uses. The facts amply support the statement that all of the Republican candidates engaged in illegal and corrupt practices to obtain the nomination of their party.

On November 2, 1926, Vare was elected United States Senator from Pennsylvania over his Democratic opponent, Wilson. Vare's credentials followed the same course as did those of Smith, heretofore set out in detail, and Vare, like Smith, was finally denied his seat in the United States Senate.

THREE—THE NEWBERRY RESOLUTION

At the time of the immense expenditures of money by Smith and Vare and their Republican opponents to secure the nomination of their party to the Senate, all parties involved were cognizant of the following resolution adopted by the Senate on January 12, 1922, in its investigation of the campaign expenditures of Senator Truman Newberry of Michigan: "That whether the amount expended in the pri-

mary was $195,000, as was fully reported and openly acknowledged, or whether there was some few thousand dollars in excess, the amount expended was in either case too large—much larger than ought to have been expended. The expenditures of such excessive sums in behalf of a candidate, either with or without his knowledge and consent, being contrary to sound public policy, harmful to the honor and dignity of the Senate, and dangerous to the perpetuity of a free government, such excessive expenditures are hereby severely condemned and disapproved".

APPLICABLE SECTIONS OF THE FEDERAL CONSTITUTION

In addition to the statement of facts involved in the Smith-Vare controversy, it will be necessary, before proceeding further with the discussion of this question, to quote certain sections of the Federal Constitution which are pertinent to the question.

Article 1, *Section* 3, *Paragraph* 3, though set out in the "INTRODUCTION", will be again quoted because of its importance: "No person shall be a senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state from which he shall be elected."

The Fourteenth Amendment, Section 3, provides for an additional disqualification for senators; "No person shall be a senator or representative in Congress, ... , who, having previously taken an oath as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same or given aid or comfort to the enemies thereof. But Congress may, by a vote of two-thirds of each house, remove such disability".

Article 1, *Section* 5, *Paragraph* 1, though set out in the "INTRODUCTION", will be again quoted because of its great importance: "Each house shall be the judge of the elections, returns, and qualifications of its members, and a majority of each shall constitute a quorum to do business . . . . . ".

Article 1, *Section* 5, *Paragraph* 2, provides that "Each house may determine the rules of its proceedings, punish its members for disorderly behavior, and with the concurrence of two-thirds, expel a member."

ARGUMENT

By a thorough analysis of the facts involved in the Smith-Vare controversy, and of the pertinent constitutional sections, it is clearly apparent that the solution of the question being considered in this paper depends upon what is the proper construction to be put upon Article 1, Section 3, Paragraph 3 and Article 1, Section 5, Paragraph 1. It will be remembered that the first section sets out the three constitutional qualifications for a United States Senator, and the second section makes the Senate the sole judge of the elections, returns, and qualifications of its members. The advocates of the negative side of the question contend that the second section must be read in conjunction with the first section, and that the word "qualifications" refers only to the three constitutional qualifications. Those favoring the affirmative side of the question contend that as there is nothing in the Constitution itself which expressly limits the Senate to the construction that the word "qualifications" means constitutional qualifications, the Senate is at liberty and has the constitutional right to impose mental and moral qualifications upon senators-elect. It is thus seen that the question resolves into what is the proper construction to be placed upon the two aforementioned sections of the Constitution. The factors affecting this construction are first, the actual wording of the sections themselves; second, the precedents set by the Senate in the construction of these sections; and third, the practical results of the so-called liberal construction.

ONE—CONSTRUCTION OF THE WORDING OF THE TWO SECTIONS

In none of the applicable constitutional sections can there be found a single word or phrase which expressly limits the Senate's right to judge the qualifications of its members to a consideration of the three qualifications of age, citizenship, and residence. If there is such a limitation, it must be an implied one, for certainly there is no such express limitation. The mere fact that these are the only qualifications mentioned in the Constitution does not necessarily mean that the Senate in judging its members is limited to those three qualifications. Such an argument is a "non sequitur". Furthermore, such a limited construction is not justified by the wording of Article 1, Section 3, Paragraph 3, which will be repeated by way of emphasis: "No

person shall be a senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state for which he shall be chosen". As pointed out by Senator Edmunds in 1867, when the Senate refused to seat Senator-elect Philip Thomas from Maryland because of his alleged personal disloyalty to the Federal Government, this section contains nothing but negative statements which are exclusive in their phraseology and meaning. It does not declare who *shall be* admitted into the Senate of the United States, but instead declares who *shall not be* eligible to election to the Senate. The plain and evident meaning of this section is that a person not possessing the qualifications of age, citizenship, and residence shall not be eligible to election to the Senate, and the section does not mean that every person possessing the three required qualifications shall be eligible. In other words, all that the section does is to provide that if a person fails to possess the three constitutional qualifications, he can not be elected to the Senate. It does not undertake to provide that if a person does possess those qualifications, he has an absolute right to be seated in the Senate if elected thereto by the voters, regardless of how many other necessary qualifications he may lack. By establishing three requisites necessary to an election to the Senate, the Federal Constitution did not intend to deny to the Senate the constitutional right to impose additional qualifications in order to protect and maintain its honor and integrity as the world's greatest legislative body.

Those who assert the limitation of the powers of the Senate to judge the qualifications of senators-elect, must of course, maintain that if a duly elected senator presents his proper credentials to the Senate, and satisfies the three constitutional requisites of age, citizenship, and residence, the power of the Senate is gone and it must admit him, even though he may be a confessed traitor to the United States, or may have committed some heinous crime repulsive to all mankind, or may be a moral degenerate or even may be mentally incompetent. A common sense viewpoint should convince even the most skeptic that the framers of the Constitution never for a moment intended for such an impractical and outrageous construction to be put upon the power of the Senate to judge the qualifications of persons elected to it, and also that an opposite construction could not be deemed an invasion of a state's right to elect its senators.

It is true that the excessive campaign expenditures of

Smith and Vare occurred in the primary elections, and that in the *Newberry Case,* 256 U. S., 243, the United States Supreme Court declared invalid an Act of Congress attempting to regulate primary elections, for the reason that under Article 1, Section 4, Paragraph 1, the power of Congress to *enact legislation* dealing with elections is limited to general elections. However, the decision in that case is controlling upon the Senate's action in the Smith-Vare controversy, because that action was not predicated upon any Federal statute, but upon rules of the Senate adopted in the Newberry Resolution in 1922 heretofore set out under "FACTS". There is a marked distinction between a Federal statute controlling primary elections, and a resolution of the Senate condemning as improper excessive campaign expenditures in primary elections. Because Congress cannot enact such legislation is no reason why the Senate cannot adopt such a resolution which sets a maximum standard for campaign expenditures in primary elections. Such a resolution is intended only as a guide to the Senate in passing upon the qualifications of senators-elect. The Senate is perfectly justified in considering a violation of the Newberry Resolution as sufficient grounds for disqualifying a senator-elect from becoming a member of the United States Senate:

TWO—PRECEDENTS GOVERNING THE CONSTRUCTION OF THE TWO SECTIONS

In construing the Federal Constitution, it is well to always look at the state of affairs in England prior to the adoption of the Constitution to see if any precedents can be found which will throw light upon the particular section to be construed. Prior to and at the time of the adoption of the Federal Constitution the House of Commons was the exclusive judge of the elections, returns, and qualifications of its own members. What was its constitutional power under that rule? It was that the House of Commons was the sole and exclusive judge, not only of the citizenship and property qualifications of persons who should be elected, but also of everything that entered into the personnel of the man who presented himself at the doors of the House of Commons with a certificate of election for admission. And what were those personal qualifications? One was that an idoit or an insane man could not be a representative in the Commons, another was that a moral degenerate could not be seated, and there were other quali-

fications of which the House of Commons itself was the exclusive judge. This power of the House of Commons was demonstrated in the famous case of John Wilkes, who was a profligate and moral degenerate. During the period between 1760 and 1770, he was thrice elected by the people of Middlesex to the House of Commons, and thrice that body refused to permit him to take his seat. Finally, after his fourth election, the Commons did seat him, not because it recognized any limitation on its power to again expel him, but rather because under the political conditions then existing, it thought the wisest policy would be to seat him.

Having seen that the House of Commons, in judging the qualifications of members elected to it, was not limited to the requirements of citizenship and property qualifications, let us see whether or not that precedent has been followed in the United States. Looking at the situation in the House of Representatives, whose constitutional right to refuse to seat a member duly elected is co-extensive with the right of the Senate, we find the case of Brigham Roberts, who came to the House armed with entirely proper credentials absolutely valid upon their face. He was not subject to any of the constitutional disqualifications. It was charged against him and eventually established that he had four wives. The House refused to permit him to take the oath, and referred his credentials to the proper committee, which reported against him. He was then denied his seat in the House and was excluded therefrom. The Brigham Roberts controversy settled many years ago the fact that the House of Representatives can refuse to seat a duly elected representative for disqualifications other than the three set out in the Constitution. What is true of the House also applies to the Senate, because both bodies derive their powers in this matter from Article 1, Section 5, Paragraph 1.

Let us now consider the situation in the Senate prior to the Smith-Vare controversy. In 1844, John Niles was duly elected senator from Connecticut. When he presented his proper credentials to the Senate, his right to a seat in that body was contested on the ground that he was mentally incompetent. His credentials were referred to a select committee which, after an investigation, reported that Niles was mentally competent. He was permitted to take his seat. While the Niles controversy is not an instance of where the Senate actually excluded a senator-elect because of mental incompetency, yet it does show clearly that the Senate considered without question that it had the constitutional right to refuse to seat Niles if he had been mentally incompetent, because, if it had not considered itself as hav-

ing that constitutional right, the controversy would never have been referred to a select committee.

In 1864, King Cutler and Charles Smith, duly elected senators from Louisiana, were denied the right to take the oath and were not permitted to have a seat in the Senate. Both claimants possessed all of the constitutional qualifications, and yet the Senate refused to seat them because the State of Louisiana was at the time allegedly disloyal to the Federal Government. Again in 1865, Joseph Seegar and John Underwood, duly elected senators from Virginia, were denied seats in the Senate, solely on the ground that the State of Virginia was in rebellion. In 1867, Philip Thomas, duly elected senator from Maryland, who possessed all the constitutional qualifications, was denied a seat in the Senate solely on the ground that he had sympathized with the Southern States in the Civil War. In all three of the above controversies, the Senate excluded the duly elected senators on grounds other than the existence of constitutional disqualifications. It is to be noticed also that all three controversies arose before the Fourteenth Amendment was adopted in 1868, Section 3, Paragraph 3, of which is quoted under "APPLICABLE CONSTITUTIONAL SECTIONS", and which gave the Senate the power to refuse to seat a senator elected under conditions similar to the elections of the senators set out above.

In 1912, William Lorimer, duly elected senator from Illinois, was expelled from the Senate, after having been seated, on the ground that corrupt methods and practices were employed in his election to the Senate. It was distinctly brought out at the time by the report of the Investigating Committee that Lorimer himself was not personally guilty of corrupt practices in securing his election.

In 1922, the Senate adopted the Newberry Resolution heretofore quoted in full under "FACTS". While the Senate finally voted to let Newberry keep his seat, yet that resolution clearly expressed the attitude of the Senate in regard to large campaign expenditures, either in the primary or general election. It also shows that the Senate at that time considered that it has the constitutional right to refuse to seat a senator-elect when his excessive campaign expenditures have tainted his election with political corruption.

All of the precedents cited above forcibly illustrate the fact that the Senate has always had the constitutional right to refuse to seat a duly elected senator when he fails to possess the proper mental or moral qualifications.

THREE—THE PRACTICAL RESULTS OF A LIBERAL CONSTRUCTION

Sections 1 and 2 of the "ARGUMENT" have been devoted to establishing the proposition that in consideration of the reasonable construction of the wording of the constitutional sections involved in this question, and of the long line of precedents established by the Senate, that body is not limited to the constitutional qualifications in judging the fitness of senators-elect. It would be well now to see the actual practical results of this construction of the Senate's power.

George Norris, Republican Senator from Nebraska, said in a speech before the Senate: "The expenditure of huge sums of money for seats in the United States Senate cannot be justified unless we desire to turn over that great legislative body to the multi-millionaires of the country who are willing to buy legislation the same as though it were merchandise sold for cash to those who are willing and able to pay the price. If this practice is to be condoned, then we have placed seats in the highest legislative assembly upon the auction block, and we have by indirection defeated every fundamental principle that underlies our governmental structure".

The truth of Senator Norris' words is strongly substantiated by the enormous expenditures in the Pennsylvania and Illinois Republican primaries where, in the first state, over $2,800,000 was spent by three candidates to secure a $10,000 a year office, and where, in the second state, over $1,000,000 was spent by two candidates for a similar purpose. Common sense tells us that such large sums of money are not spent to educate the voters, and that consequently, such elections are tainted with bribery and fraud. Experience likewise assures us that every dollar spent by a political machine for the election of a United States Senator is only an investment. It must be all repaid with interest. As a matter of fact, it must not only be repaid with interest, but the principal is repaid many times, and this payment must come through some form or other of tribute from the average citizen.

A liberal construction of the Senate's power to judge the qualifications of senators-elect has the effect of preventing the deplorable condition outlined above, because it empowers the Senate to refuse to seat a senator-elect who has expended too much money in his campaign, as was the condition in the cases of Smith and Vare. By this power the

Senate will be able to preserve inviolate its fine heritage of honor and integrity which is so richly and justly cherished. It is argued by the strict constructionists that if the Senate has the power to go beyond the three constitutional qualifications in determining whether or not senators-elect are entitled to their seats in the Senate, it might abuse that power and arbitrarily keep men out of the Senate without any valid reason whatsoever. The truth is that it is a physical impossibility to confer power upon any body of men without at the same time conferring upon them the right to abuse that power. However, if it is possible to be certain of any fact, it is possible to rest assured that the Senate of the United States will never arbitrarily refuse to seat a duly elected senator without some valid grounds to sustain its action. The great history of the Senate, together with the high type of men that do and will constitute its membership, will be ample safeguard against any such problematical abuse of power.

CONCLUSION

In view of the wording of Article 1, Section 3, Paragraph 3, and Article 1, Section 5, Paragraph 1, and of the line of precedents construing those sections of the Constitution, and furthermore, of the practical results and benefits received from a liberal construction, it is quite evident that the only true and reasonable construction to be placed on those sections is that the United States Senate is not confined to the constitutional qualifications in judging the qualifications of senators duly elected to the Senate. Consequently, the Senate has the constitutional right to refuse to seat a duly elected senator, when, as in the case of Smith and Vare, he fails to possess the proper mental or moral qualifications.

USE OF THE WRIT OF SCIRE FACIAS IN MISSISSIPPI

By W. R. Newman, Jr., Mississippi Law School

The purpose of this article is to give a brief discussion of the use of the writ of scire facias in this state. In order to obtain a better and more complete understanding of its use, I think it would be well to take very briefly a little of the history of the writ. The writ was not known to the early common law, but is wholly the creature of statute and seems to have had its origin in the statute of 13 Edward I, the purpose of which was to remedy the inconvenience and burden of collecting a judgment, when the time within which execution might have been issued on the judgment had passed. Under the common law, in such a case it was necessary to sue on the judgment in a new action and obtain a new judgment, as the old one had lost its vitality by lapse of time. The adoption of the common law of England by the several states of this country is generally considered to have included the right to pursue the remedy by scire facias.[1]

In my study of the subject, I find that the writ is used for a great many purposes in this state and a definition which would include its many uses must necessarily be long and very inclusive. The writ of scire facias like a great many other legal terms and names is very hard to define. Scire facias is derived from the Latin language meaning: "that you make known." The writ of scire facias has been defined as a writ founded on some matter of record such as a judgment, recognizance, letter patent, etc., and requiring the person against whom it is brought to show cause why the person bringing it should not have advantage of such record or as in case of a scire facias to repeal letters patent why the record should not be annulled or vacated; also the name of a writ or the whole proceeding founded on some public record. It is a generic term, and includes proceedings of two distinct classes. One class is where the writ is the commencement of an original action, as to repeal letters patent, charters, as a charter or pardon and the like. In the other class it is a judicial writ to carry on a suit

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1 24 R. C. L. 666.

in which some other person has acquired an interest to revive a judgment, remedy defects, or for like purposes. But in all cases it is considered an action because the defendant may plead to it.[2] The writ has been defined by our courts as a judicial writ issuing out of the court where the record reposes, and because the defendant may plead thereto it is called an action. For some purposes at common law it was in the nature of an original action as to repeal letters patent but where the purpose is to revive a judgment against an executor or administrator, so as to charge the personal representative with the duty of payment, and have the right to execution against the decedent's effects, it is but the continuation of the former suit.[3]

Public records to which the writ is applicable are of two classes, namely: Judicial and Non-judicial. Judicial records are of two kinds, namely: judgments in former suits, and recognizances which are of the same nature as judgments. When founded on a judgment the purpose of the writ is either to revive the judgment which because of lapse of time is presumed in law to be executed or released, and therefore execution on it is not allowed without giving notice. By the writ of scire facias notice is given to the defendant to come into court and show, if he can by release or otherwise, why execution ought not to issue; or to make a person who derives a benefit by or becomes chargeable to the execution a party to the judgment who was not a party to the original suit. In both of these classes of cases, the purpose of the writ is merely to continue a former suit to execution. When the writ is founded on a recognizance, its purpose is, as in cases of judgment, to have execution though it is not a continuation of a former suit as in the case of judgment, yet not being the commencement and foundation of an action it is not an original but a judicial writ. When founded on a judicial record, the writ must issue out of the court where the judgment was given or recognizance entered of record. Non-judicial records are letters patent and corporate charters. The writ when founded on a non-judicial record is the commencement and foundation or an original action and its purpose is always to repeal or forfeit the record. Scire facias is also used to suggest further breaches on a bond with a condition, where a judgment has been obtained for some but not for all of the breaches, and to recover further installments

2 35 Cyc. Page 1148;
3 Pollard v. Echford, 50 Miss. 631.

where a judgment has been obtained for the penalty before all the installments are due.[4]

As remarked at the beginning, the writ of scire facias is used for many purposes. It may be used in the following instances: (1) To continue, or revive actions on death of the party; (2) to enforce or revive judgments; (3) to enforce the liability of an indorser or a writ for cost; (4) to enforce payment of alimony; (5) to enforce mechanics lien; (6) to enforce forfeited bail bonds and recognizances; (7) to enforce award in replevin; (8) to enforce an order for support in bastardy proceedings; (9) to enforce liability of stockholders on a judgment against the corporation; (10) to bring in necessary parties; (11) to give relief against a fraudulent conveyance; (12) to foreclose mortgages; (13) to hear errors; (14) to obtain new executions; (15) to enforce sheriff's liability for an official default; (16) to repeal letters patent; (17) to revoke or annul grants of land improperly made or forfeited by the grantee thereof; (18) and to vacate or forfeit corporate charters and franchises.

The writ of scire facias is used both as an original writ to obtain a judgment where none has before existed, and as a writ in execution or continuation of a judgment previously entered. It is generally held that a scire facias to revive a judgment is not an original process but is merely a continuation of an action, a step in the enforcement of the original judgment. It is dependent on the liability previously established by the judgment, it is used to revive and creates nothing new but preserves what already exists and would be lost without it. It is not however a writ of execution, its function being to give notice to show cause why execution should not issue and to afford a person affected by the execution of the judgment an opportunity to make a defense thereto. But while a scire facias proceeding to revive a judgment is not a new action it so far partakes of the nature of a new action that the defendant may appear and plead to it in the same manner as to an action founded on an original writ.

A writ of scire facias occupies the place and performs the office, of both a writ of summons to bring the defendant into court and a declaration. The writ therefore must contain every material averment necessary in a declaration, and it should show every material fact to entitle the plaintiff to the judgment prayed for. It should also contain

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4 Bouvier's Law Dictionary Pages 960-961.

upon its face such statements of fact as will justify the form in which the process issues, and to show that the parties are the proper ones. The writ when based on a judicial record is a judicial act and it must be awarded by the court in which the record upon which it is based reposes. It must be signed by the judge or clerk. If the writ is issued by any other court, it will be a mere nullity and an appearance and answer by the defendant will not confer jurisdiction. It has been held in this state that the writ of scire facias is to be issued, served and returned as a summons.[5] In regard to the issuance of a writ of scire facias in this state the statute provides that: "Writs of scire facias may be issued to any county, and shall be executed and returned in the same manner as a summons. If the defendant be a non-resident of the state, or cannot be found to be served with the process, the clerk may make publication requiring the appearance of the defendant; and, on proof of publication, the court may proceed as if the writ of scire facias had been served on the defendant."[6] In view of this fact it was held that a scire facias shall be executed and returned in the same manner as a summons, which has to be served personally on the defendant, if to be found, and a true copy delivered to him. It was held that a return made, "Executed by personal service", is insufficient.[7] At common law where the sheriff returns nil, plaintiff must sue out an alias scire facias. If he returns nil to the second writ, judgment may be entered. In Mississippi, however, the writ as above stated is required to be served as a writ of summons.[8] A scire facias may be served on a non-resident by serving the same on his attorney in fact, although not the attorney in the original suit and a motion by said attorney to quash is the same as an appearance by the defendant. The scire facias must be returned to the court where the original proceedings are of record. Service of the writ is required to be served by a delivery of a copy and a return on a writ of scire facias that it has been executed by reading is illegal.[9]

A writ of scire facias being a substitute for a declaration, a demurrer will lie thereto as in case of other declarations, when facts set up in the writ are not sufficient to show a cause of action. Matters which might have been pleaded in defense to the original proceedings which gave

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5 Davis v. Patty, 42 Miss. 509;
6 Code of 1906 Section 3936.
8 Saffold v. State, 60. Miss. 928.
9 Thomas v. State, 62 Miss. 184.

rise to the obligation of record cannot be pleaded to the scire facias thereon. For example that the statute of limitations was a bar to the original action cannot be set up as a defense to the writ of scire facias on a judgment. The court said in the case of *Pollard v. Echford,* that the object in this case is to make a new party to the judgment, and charge him with the duty of making satisfaction, and he cannot set up any defense which existed anterior to the original action.[10] The only available plea to a scire facias, relying on matter in bar are such as are subsequent to the original proceeding, as discharge, payment, or the like.[11] Where the defendant in a scire facias purporting to have been issued upon a judgment nisi based upon a forfeited recognizance files a plea of nul tiel record averring that no such bond and judgment as set out in the scire facias are of record, the plea is not demurrable as being double in attacking both the recognizance and the judgment nisi. The averment referred to being simply a statement of two defects in one and the same record.[12] The defendant may also plead by way of defense to a scire facias founded upon matters of record, the subsequent satisfaction or discharge thereof. A demurrer to a scire facias only raises a question as to the sufficiency of matters appearing on the record, or necessarily implied by law. In a scire facias to enforce a judgment or forfeiture of any recognizance, the recognizance is not properly a part of the record, and defects therein cannot be taken advantage of by demurrer, but only by plea of nul tiel record.[13] It has been held also in this state that where the writ of scire facias is regarded only as a summons, and not as a pleading, although a demurrer thereto is not proper, and that where the writ is so fatally defective as not to be amendable, it may be quashed on motion like any other bad writ, and a motion by an attorney to quash the return on a scire facias issued against a defendant is equivalent to an appearance by him.[14] The writ may be amended any time before judgment.[15] As stated before in scire facias proceedings the plaintiff as in other actions, may demur to the plea to the writ, instead of replying to it.

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10 Pollard v. Echford, *supra;* Also see, Roberts v. Weiler, 55 Miss. 249; Person v. Valentine, 13 S. & M., 551; Matthews v. Mosby, 13 S. & M., 422.

11 Langston v. Abney, 43 Miss. 161;

12 Pounds v. State, 60 Miss. 925;

13 State v. Rhonimus, 47 Miss. 314; Fields v. State, 39 Miss. 509; Ditto v. State, 30 Miss. 126.

14 Fisher v. Battaile, 31 Miss. 471; Gwynne v. State, 64 Miss. 324;

15 Pounds v. State, *supra.*

And for irregularities apparent on the face of the writ of scire facias it may be taken advantage of by a motion to quash or the defendant may plead in abatement or bar as in other actions. He may by a plea of nul tiel record, deny existence of the record, or the defendant may also plead by way of defense to a scire facias founded upon record the subsequent satisfaction or discharge of the record itself. In proceedings by scire facias, as in ordinary actions the usual rule prevails that the plaintiff in his replication to the plea of the defendant need not set out with particularity facts which must rest in the knowledge of the defendant.

Though the recital in the writ of the former proceedings should be in general exact, yet the fact that it contains irrelevant matter and is informal will not vitiate it; nor will a variance between the writ and the former proceedings be fatal where it is not material, or of a nature to work injury to either of the parties. Material variances in the recital of former proceedings will, however, vitiate the writ and will be fatal on a plea of nul tiel record or other appropriate plea. A substantial variance between the obligation of record as recited in the writ and that offered in evidence or between a pleading and the evidence offered in support thereof is fatal. After judgment by default on scire facias advantage cannot be taken of a variance between the scire facias and the obligation of record on which the writ is based.[16] A scire facias being as has been said a judicial writ founded upon some matter of record, it should pursue the terms of the judgment or other matter of record upon which it is founded.[17] It is not sufficient to set forth in the scire facias to revive a judgment that the judgment has been enrolled. The want of the enrollment of the judgment, if material at all should be set up by way of defense.[18] A substantial variance between the obligation of record as recited in the writ and that offered in evidence, or between the scire facias and the judgment nisi or recognizance is fatal in the first instance, but is amendable in the second case. In the case of *Douthit v. State,* the court held that if the judgment nisi and the scire facias taken as parts of the same proceedings, are insufficient to sustain the final judgment it is erroneous. In this case judgment nisi was

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16 Saffold v. State, 60 Miss. 928; Smith v. State, 76 Miss. 728; Marx v. State, 61 Miss. 478; Bridges v. State, 24 Miss. 153; State v. Borroum, 25 Miss. 203; Tucker v. State, 55 Miss. 452.

17 Tucker v. State, *supra;* Pounds v. State, *supra.*

18 Commercial Bank v. Kendall, 13 S. & M. 278; Hughes v. Wilkinson, 28 Miss. 660.

entered against bailee for the non-appearance of the principal, J. W. Douthit.[19] Parties to a scire facias on a forfeited bail bond, who are duly notified and who fail to make defense, cannot on appeal from a judgment by default predicate error of a variance between the bond and the scire facias where the scire facias is not supported in a material particular by the judgment nisi. A judgment final inconsistent with the judgment nisi is erroneous.[20] In the case of *Tucker v. State,* it was found that the recital in the scire facias did not sufficiently conform to the recognizance and judgment was erroneous, where one Hamison was indicted in May 1874, and entered into recognizance to appear from day to day until discharged, the scire facias recited that he was, "Recognized to appear at September Term, 1876", and on which a judgment final was rendered. It has been held that when the scire facias fails to recite the day or term of court when the judgment nisi was rendered, and a plea of non-appearance, was interposed, it is erroneous to render judgment final without first amending the writ When the record fails to show the date of the judgment nisi proceedings on a forfeited recognizance the case will be reversed on appeal and amendment allowed when the case returns to the lower court.[21] A judgment on a scire facias which does not recite the original judgment correctly is erroneous.[22] The scire facias must be supported by the judgment, nisi in every material respect.[23] A writ of scire facias may be amended to the same extent as a declaration in other cases so as to conform to the record, on which it is based or to the instructions given to the clerk even after a plea of nul tiel record and even after appeal if justice requires it.[24] By the weight of authority in this country a joint scire facias may be maintained on a several obligation of record, but judgment should be rendered to have execution according to the effect thereof. This seems to be the rule that is followed in this state. If a recognizance is joint and several and a scire facias thereon is served on one or more, and returned nihil as to the others judgment may be rendered against those served, and execution issued thereon.[25]

The method of enforcing a bail is by means of a scire

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19 Douthit v. State, 30 Miss. 133.
20 Smith v. State, *supra.*
21 Marx v. State, *supra.*
22 Bridges v. State, *supra.*
23 Ditto v. State, 30 Miss. 126.
24 Pounds v. State, *supra;* Curry v. State, 39 Miss. 511.
25 Dean v. State, 2 S. & M. 200; Saffold v. State, *supra.*

facias proceeding. The statute of this state provides that: "If a defendant, prosecutor or witness in any criminal case, proceeding or matter, fail to comply with the terms of his bond or recognizance, the court may, at any time after default made, enter judgment nisi against the obligator and his sureties in the bond or recognizance, and thereupon a scire facias may issue, returnable to the next term of court, as in other cases, and upon the return of service of the scire facias, or upon the return of two writs of scire facias by the proper officer of the county where the bond or recognizance was entered into, 'not found' judgment may be made absolute thereon, unless a sufficient showing to the contrary be made to the court at the time the case is called in its order on the docket."[26] The purpose of a scire facias upon forfeited recognizance is to give notice to the parties thereto to show cause why judgment should not be rendered against them for the amount of the recognizance or bond. A scire facias on a recognizance it seems it generally held to be in the nature of an original action. A recognizance when forfeited is usually held to become a matter of record and the usual rule prevails as in other cases that the scire facias can issue only from the court in possession of the record upon which it issues. This is not strictly true in this state. It has been held in this state that after the judgment nisi the scire facias is issued to enforce that judgment and the recognizance is not properly a part of the record, but must be brought before the court by a plea of nul tiel record or other appropriate plea.[27] Where a scire facias is not supported in a material particular by the judgment nisi a judgment final inconsistent with the judgment nisi is erroneous. A writ of scire facias upon a forfeited recognizance in criminal cases, standing as it does in place of both process and declaration, should contain every averment necessary to show a right of recovery.[28] In the case of *Washington v. State,* in which case the proceeding was one by scire facias to make final a conditional judgment rendered against the defendant as sureties on a forfeited bail bond, the court held it was a suit to recover money and the proceedings are civil and not criminal in their nature. It has been held by this court that the scire facias on a judgment nisi rendered on a forfeited bond; is to be regarded as a declaration, as well as the process or writ, by which the de-

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26 Code 1906, Sec. 1468.

27 State v. Rhonimus, 47 Miss. 314; Ditto v. State, *supra;* Fields v. State, *supra.*

28 Curry v. State, *supra.*

fendant is summoned to appear. The proceedings on a scire facias of this character are the same as in other civil cases where a question of fact is raised by the pleadings. The issue raised by a plea of nul tiel record is one for the court to determine, but if the character of the plea filed raises a question of fact it should be submitted to a jury.[29]

It was held in the case of *State v. Ricketts* that a scire facias on a forfeited bail bond, which cites the parties thereto to appear at the next term of circuit court of Grenada County on the . . . . . Monday of January, 1888, is not void for failure to fix the date for the beginning of the term as this is fixed by law. The court held the parties were sufficiently notified. But the court has held that when the scire facias fails to recite the day or term of court when the judgment nisi was rendered, and a plea nul tiel record is interposed, it is error to render a judgment final without first amending the writ.[30] Where the return on the scire facias shows that the principal and all the sureties on the bond were notified except one who could not be found, it is not error to dismiss as to those not found, and to proceed to judgment against the sureties served. Parties to a scire facias on a forfeited bail bond who are duly notified and who fail to make defense cannot on appeal from a judgment by default predicate error of a variance between the bond and the scire facias. A scire facias is an original process and the sheriff must state in his return all that he did in execution of the process. The usual prayer in the writ of scire facias issued against bail is that the defendant should show cause why plaintiff should not have execution of debt or damages. As a general rule the writ of scire facias against bail must be served upon the defendant, and the ordinary rule as to service of the writ of scire facias applies here, and should be returned in the same manner as other process. Such proceedings against bail are considered an action and the defendant may plead to it, and the writ is demurrable as in the case of other pleadings, as where it fails to set forth a cause of action or if it fails to state the substance of the bail bond. In scire facias against bail if the defendant pleads, and an issue of fact is presented by the pleadings he is entitled to a jury trial.

The statute of Mississippi provides that: "The mode of proceeding on a peace bond shall be by scire facias issued by the clerk of the court, on the order of the court or the

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29 Washington v. State, 98 Miss. 150.
30 Rickets v. State, *supra;* Marx v. State, *supra.*

district attorney, returnable to the court at its next term, requiring the obligors to show cause why the bond shall not be declared forfeited because of the breach of its condition, which shall be recited in the scire facias; and upon the return of the scire facias executed, or of two of such writs, 'not found' by the sheriff of the county, if sufficient showing be not made to the contrary, judgment may be rendered on such bond; but the court may remit any part of the amount of such bond, or the judgment rendered thereon, as may be reasonably just."[31]

As stated at the beginning of this paper the writ of scire facias may be used to suggest breaches on bonds with a condition. We have in this state a statute bearing directly on the subject, which is as follows: "In all actions upon bonds with a condition the plaintiff shall state the condition and assign breaches thereof in his declaration; and evidence shall not be given of any breach unassigned. The jury shall assess damages for such of the breaches so assigned as may be proved, and execution shall issue for so much, and the judgment shall stand as a security to the plaintiff for any other breaches that may afterwards happen; and he may have a scire facias thereon and assign any other breach, and thereupon damages shall be assessed and execution issued as before."[32]

This writ may be issued against defaulting witnesses. A writ of scire facias issued pursuant to the statute against a defaulting witness being both a process and a declaration should show every material fact to entitle the plaintiff to judgment, and it must show by positive averment that the subpoena has been issued and served, and when the witness was to appear. We have a positive statute authorizing such use of the writ in this state, which is as follows: "Every witness subpoenaed in any case, civil or criminal, shall attend, from day to day and from term to term without further notice, until discharged by the court or by the party at whose instance he was subpoenaed; and in default thereof he shall be fined by the court not more than five hundred dollars, and a scire facias shall issue thereon, requiring him to appear at the next term of court, to show cause why the fine should not be made absolute; and, if cause be not then shown, the fine shall be made final. In criminal cases, the court may cause the witnesses on either side to be bound by bond or recognizance to appear and testify until dis-

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31 Code of 1906, Section 1557.
32 Code of 1906, Section 736.

charged."[33] A writ of scire facias may be issued by the justice of peace for a defaulting witness. A form for this purpose is set out in the code.[34]

At common law a judgment lost its force as a lien on the judgment debtor's realty, and no execution could be issued thereon when it had lain dormant for a year and a day. Now by statute in the various jurisdictions there is a fixed limitation of the period during which the life of the judgment continues, which is usually considerably greater than the common law period. These statutes universally provide that a judgment which has become dormant and lost its lien may be revived and made to regain its original force. This is accomplished by scire facias, action on the judgment, or special statutory proceedings. We have several statutes in this state on the subject or revival of judgments by scire facias, and taking them out of the old common law rule of allowing them to lose their force at the expiration of a year and a day. They provide as follows: "It shall not be necessary to revive a judgment by scire facias, because no execution shall have been issued on such judgment, within a year and a day after its rendition, but execution may be issued without such revival."[35] "The provisions for the execution of judgment without revival shall not prevent a revival in any case by scire facias."[36] "When judgment shall have been rendered against two or more persons, and any one or more of them shall die, such judgment shall survive against the representatives of the deceased parties and the survivor; and a scire facias may issue against the survivor, jointly with the representatives of the deceased parties; and such judgment may be thereupon revived, and execution issued in like manner."[37] A void judgment cannot be revived by scire facias but a judgment which is merely erroneous may be so revived. In the absence of a statute directing another method of proceeding a scire facias is also proper in case of a change of parties where it is sought to benefit or charge a new party by the execution.[38] By virtue of the above section 824 the court held that where an execution has been issued upon a judgment within a year and a day after the rendition thereof, it is unnecessary under the statute to revive the judg-

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33 Code of 1906, Sec. 3954.
34 Code 1906, Sec. 2737.
35 Code 1906, 824.
36 Code 1906, Sec. 3978.
37 Code of 1906, Sec. 726.
38 Locke v. Brady, 30 Miss. 21

ment within seven years after its rendition; and a proceeding by scire facias for that purpose should be dismissed upon the motion of the defendant as a useless addition to costs.[39] If after the execution has been issued and before levy the defendant dies, no revivor of the judgment is necessary, but the execution may be perfected forthwith against his personal representatives.[40] It also seems that a revival of decrees as well as revival of judgments by scire facias is authorized in this state and others.[41] A scire facias has been called an action for some purposes and in this state has been apparently treated as a new action, even where its object is the revival of a judgment.[42] A scire facias to revive a judgment is in the nature of an original process and also of a declaration. It is a process to bring in a new party sought to be charged with the judgment. It is a plaint in so far as it counts on the debt or record and gives the administrator a day in court to show cause why he should not be so charged.[43] A scire facias to revive a judgment against several joint defendants must unless the non-joinder is waived, issue against all of them, and if he discontinue his scire facias as to any of the parties it operates as a discontinuance of the whole proceeding. It has also been held in this state that where a judgment has been recovered and the defendant therein has executed a forthcoming bond with a surety, and the surety has died, it is error for the plaintiff in the judgment to sue out a scire facias to revive it against the administrator and heirs of the surety in the forthcoming bond; and the administrator and heirs cannot thus be legally joined.[44] A writ of scire facias to revive a judgment need not aver the performance of all things essential to the validity of the judgment. If the judgment has not in fact been enrolled and such omission is material at all it should be set up by way of defense.[45]

A scire facias against terretenants may be either general against all of the terretenants or against certain named parties as terretenants, and though it is necessary that all be summoned, it is not necessary that they all be named in the scire facias. In the case of *Hughes v. Wilkinson,* it ap-

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39 Buckner v Pipes, 56 Miss. 366.
40 Thompson v. Ross, 26 Miss. 198.
41 Isom v. McGehee, 45 Miss. 712.
42 Pickett v. Pickett, 1 How. 271.
43 McLeod v. Harper, 43 Miss. 42.
44 Barnes v. McLemore, 12 S. & M. 316.
45 Commercial Bank v. Kendall, 13 S. & M. 278.

pears that the names of the heirs and terretenants though not mentioned in the scire facias were entered by the clerk on the back of it, as the parties to be summoned, and that they were summoned by the sheriff. It was held in this case that scire facias against the terretenants though they must all be summoned by the sheriff, it is not necessary that they should be named in the writ. The same principle applies to heirs.[46]

Under the statute of this state it is held that an administrator de bonis non has a perfect right to appear in court and suggest the death of his predecessor, and ask that a judgment recovered by such predecessor, be revived in his name as successor in the administration and he need not resort to the writ of scire facias for that purpose. In the case of *Dibble v. Norton,* the defendant in error appeared in court and suggested the death of his predecessor, and asked that said judgment be revived for him and in his name as successor in the administration of the estate of Norton, deceased. If the successor in the administration fail to appear and make himself a party, then he may be brought in by the opposite party by scire facias, but the successor has, under the statute of this state an undoubted right to have the judgment revived in his name without a scire facias upon the suggestion of the death of his predecessor.[47]

In a very brief summary of this topic we find that the proceedings in scire facias are very peculiar. The writ must recite the record or judgment and also the suggestions which the plaintiff must make to the court to entitle him to recover. The writ of scire facias constitutes the plaintiffs entire case and serves the purpose of the declaration which the defendant must plead to. In some cases the writ is to be considered an original action, while in others it is not considered an original action. In actions for the forfeiture of a corporate charter it is considered an original writ and the causes for forfeiture must be assigned in the writ. All the suggestions in the plaintiff's writ, upon which his case is founded must be answered if they are to be avoided. The writ is called because it may be pleaded to the same as a declaration, indeed it takes the place of the declaration in the case.

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46 Hughes v. Wilkinson, 28 Miss. 600.
47 Dibble v. Norton, 44 Miss. 158.

MISSISSIPPI ANNOTATIONS OF THE AMERICAN LAW INSTITUTE TORTS

RESTATEMENT NO. 1

SECTION 23. AN ACT IS DONE WITH THE INTENTION OF INFLICTING UPON ANOTHER A HARMFUL OR OFFENSIVE TOUCHING OR PUTTING ANOTHER IN APPREHENSION THEREOF IF IT IS DONE FOR THE PURPOSE OF BRINGING ABOUT SUCH A TOUCHING OR APPREHENSION OR WITH KNOWLEDGE THAT SUCH A TOUCH OR APPREHENSION WILL RESULT FROM THE ACT.

Accord (Criminal cases) *Lanier vs. State,* 57 Miss. 102, modifying *Smith vs. State,* 39 Miss. 521; *Blankenship vs. State,* 130 Miss. 725, 95 So. 81.

SECTION 27. CAUSING TO ANOTHER AN APPREHENSION OF AN IMMEDIATE AND HARMFUL OR OFFENSIVE TOUCHING, UNLESS PRIVILEGED, SUBJECTS THE ONE CAUSING IT TO BE A LIABILITY TO THE OTHER, IF:

(b) It is directly or indirectly caused by (1) an act, other than the mere speaking of words, intended to bring about such a touching or an apprehension thereof to the other or a third person.

COMMENT: "At common law the appropriate form of action for such an apprehension caused by an act done with the intention stated in this section was Trespass for Assault. Therefore, an act which subjects the actor to liability under this section is customarily called an Assault."

Accord (Criminal cases). *Lanier vs. State,* 57 Miss. 102, modifying *Smith vs. State,* 39 Miss. 521; *Blankenship vs. State,* 130 Miss. 725, 95 So. 81.

SECTION 35. (1) THE APPREHENSION MUST BE OF AN IMMEDIATE TOUCHING.

COMMENT: "The act must be apparently efficient to carry into immediate effect an intention to inflict the touching apprehended by the other. It is not necessary that one shall be within striking distance of the other or that a weapon pointed at the other shall be in a condition for instant discharge. It is enough that one is so close to striking distance that he can reach the other or that he can make the weapon ready for discharge within a very short interval of time."

ILLUSTRATION:

"(a) *A* and *B* are engaged in an altercation in *A's* shop. *B* refuses to leave *A's* shop at *A's* order. *A* collects his workmen who muster around *B,* tucking up their sleeves and aprons and threatening to break *B's* neck if he does not leave. *A* and his workmen are liable to *B.*"

Accord. *Grimes vs. State,* 99 Miss. 232, 54 So. 839.

SECTION 36. ONE WHO INTENTIONALLY PUTS ANOTHER IN APPREHENSION OF AN IMMEDIATE AND HARMFUL OR OFFENSIVE TOUCHING IS LIABLE ALTHOUGH HE GIVES THE OTHER AN OPTION TO ESCAPE THE TOUCHING BY OBEDIENCE TO A COMMAND GIVEN BY HIM.

COMMENT: "It is immaterial whether the act which the actor commands the other to do or cease doing is or is not an act which the other is under a legal duty to do or to cease doing. It is also material whether the other does or does not obey the command."

ILLUSTRATION:

"(a) *A* points a pistol at *B* and says: 'Your money or your life.' *A* is liable to *B*."

Accord. *Stroud vs. State*, 131 Miss. 875, 95 So. 738; *Hairston vs. State*, 54 Miss. 689.

SECTION 75. EXCEPT AS STATED IN SECTION 76, CONSENT PREVENTS AN INVASION FROM BEING ACTIONABLE ALTHOUGH THE INVASION CONSENTED TO IS A CRIME.

ILLUSTRATION:

"(a) *A* and *B* engage in a boxing match which is illegal because the required license has not been obtained. Each is guilty of a breach of the peace, but neither is liable to the other."

Contra. The acceptance by a defendant of the plaintiff's challenge to fight constitutes no defense to an action for assault and battery. *Lizana vs. Lang*, 90 Miss. 469, 43 So. 477.

RESTATEMENT NO. 2

SECTION 81. (2) THERE IS NO PRIVILEGE TO INVADE ANY OF ANOTHER'S INTEREST OF PERSONALITY (BATTERY, ASSAULT OR IMPRISONMENT) MERELY FOR THE PURPOSE OF VINDICATING THE HONOR OF THE ACTOR OR OF A THIRD PERSON, OR OF AVENGING AN INSULT OFFERED TO EITHER BY THE OTHER'S WORDS OR OTHER CONDUCT.

COMMENT: The fact that a plaintiff has by opprobrious words or conduct provoked the defendant to attack him affects only the extent and not the existence of liability. This is a question of the measure of damages and is, therefore, not dealt with in this part of the restatement of this subject.

ILLUSTRATION:

"(a) *A*, in a public place and within the hearing of a large number of bystanders, addresses to *B* an opprobrious epithet. *B* knocks *A* down. *B* is not privileged to do so."

Accord. *Sowell vs. McDonald*, 58 Miss. 251 (Criminal Law); *Evans vs. State*, 44 Miss. 62; *Canterbury vs. State*, 90 Miss. 278, 43 So. 678.

Section 1501, Code 1906 (Section 1322, Hemingway's 1927 Code), provides that, "In all trials for assault and battery, or for assault, the defendant may give in evidence, in excuse or justification, any insulting words used by the person on whom the assault or assault and battery was committed, at the time of the commission thereof, toward the defendant, and the jury may consider and determine whether such words were or were not a sufficient excuse for or justification of the offense committed." This statute applies to civil actions for assault. *Choat vs. Pierce*, 126 Miss. 209, 88 So. 627; *Thomas vs. Carterm*, 148 Miss. 637, 114 So. 736. Whether the insulting words are of such character as to justify an assault is for the determination of the jury. *Barr vs. State*, 21 So. 131; *Wicker vs. State*, 107 Miss. 690, 65 So. 885. Insulting words will not justify an assault with a deadly weapon. *Stone vs. Heggie*, 82

Miss. 410, 34 So. 146; *Coleman vs. Y. & M. V. R. R. Co.*, 90 Miss. 629, 43 So. 473; *Thomas vs. Carter*, 148 Miss. 637, 114 So. 736.

SECTION 82. THE INTENTIONAL INFLICTION UPON ANOTHER OF AN OFFENSIVE TOUCHING OR BODILY HARM, BY A MEANS NOT INTENDED OR LIKELY TO CAUSE DEATH OR SERIOUS BODILY INJURY, WHEN INFLICTED FOR THE PURPOSE OF PREVENTING THE OTHER FROM IMPOSING OR INFLICTING UPON THE ACTOR A CONFINEMENT, OFFENSIVE TOUCHING OR BODILY HARM, IS PRIVILEGED, IF:

(a) The other intends and the actor believes him to intend, or, although the other does not intend, the actor reasonably believes him to intend, to cause a confinement or an offensive touch of, or bodily harm to, the actor, or to put him in apprehension thereof, and (b) the other's conduct causes the actor reasonably to believe that it is likely to cause a confinement or an offensive touching of, or bodily harm to him, and—

COMMENT: "The words 'intentional' and 'intended' are used in the sense indicated in Section 9, and Treatise thereon, page 33.

"The phrase 'serious bodily injury' is used to describe a bodily harm, the consequence of which is so grave or serious that it is regarded as differing in kind, and not merely in degree, from other bodily harm. The term 'serious bodily injury' is used in preference to 'serious bodily harm' because it is used in decisions and statutes, and because the differences in the same is convenient in emphasizing the differences in legal effect between bodily harm which is grave and serious, and that which is not. An injury which creates a substantial risk of fatal consequences is a 'serious bodily injury', as is an injury whose infliction constitutes the crime of mayhem. The permanent or protracted loss of the function of any important member or organ is also a 'serious bodily injury'.

"There as no decided cases which determine whether 'bodily harm' which is not so grave as to amount to 'a serious bodily' injury can become such because accompanied by or likely to cause severe or protracted pain. This comment expresses no opinion as to the advisability or inadvisability of so regarding it.

"There are also no decided cases which determine whether a touching, though not a crime for the prevention of which death or serious injury may be intentionally inflicted, may or may not be so flagrantly indecent as to create the privilege to use such force as is appropriate to prevent serious bodily injury or death. This comment expresses no opinions as to whether such a privilege does, or does not, exist.

"The important fact in determining whether the employment of a particular self-defensive means is privileged under this section is the harm which the actor intends to inflict, or which a reasonable man in his position would realize that it is likely to cause, and not that which it actually causes. That a means, neither intended nor likely to cause serious injury, unexpectedly causes such consequences is immaterial.

"The actor is only privileged to use force intended or likely to cause death or serious bodily injury for the purpose of preventing another from inflicting or causing a like harm upon the actor. If the actor adopts such a means of defense to protect himself against a lesser bodily harm, he is liable although the harm which he actually inflicts is one for which he would not

be liable had it been inflicted by a means not intended or likely to cause death or serious bodily injury.

"In determining whether a particular 'force' is 'intended or likely to cause death or serious bodily injury', the amount of force applied, the means or weapons by which it is applied, the method of applying it and the circumstances under which it is applied, are factors to be considered.

"Whether a particular force threatens serious bodily injury or death does not depend entirely upon the nature of the weapon with which it is inflicted. A weapon which as ordinarily used threatens death or serious bodily injury and which is therefore generally described as a 'deadly' weapon, may be used so as to threaten only a lesser harm; on the other hand, a weapon which as ordinarily used threatens only a trifling harm may be so used as to threaten serious injury or death. Nor does the question depend solely upon the amount of force exerted. The other's physical condition may be known to the actor to be such that he should realize that a slight blow which would do only trivial harm to a normal person may well be fatal to the other. So, too, the surrounding circumstances may be such that the actor should realize that the use of a force which would normally do little harm is likely to result in serious injury or death. Thus, although knocking another down is usually unlikely to cause serious bodily injury, it is likely to do so if the other is known to be suffering from advanced heart disease or is standing on the running board of a rapidly driven automobile.

"This Section states only the conditions which create the privilege to use force against another for the purpose of protecting the actor from an offensive touching or bodily harm, whether trivial or 'serious', which the actor believes will result from conduct of the other which the actor believes is intended to cause an offensive touching or bodily harm, or to put him in apprehension thereof.

"The privilege to use force against another for the purpose of protecting the actor from an invasion of any of his interests of personality threatened by the conduct of another, which is and is recognized by the actor to be negligent, is stated in Section 83.

"The privilege stated in this Section exists when the offensive touching or bodily harm is inflicted *for the purpose of imposing or inflicting upon the actor a confinement, offensive touching or bodily harm.*

"The intentional infliction of bodily harm upon another or the intentional invasion of any other interest of personality of another is privileged only if it is inflicted for the purpose of preventing the other from imposing confinement or a harmful or offensive touching upon the actor or for the purpose of preventing the continuance of confinement or a harmful or offensive touching which the other has already imposed upon the actor and which the other threatens to continue to impose or inflict. In the one case it is inflicted for the purpose of preventing the actor from being confined, harmed or insulted. In the other it is inflicted for the purpose of preventing the additional confinement or the additional harm or insult which is involved in the continuance of the touching.

"In order that this privilege may exist it is not necessary that the actor's sole motive should be his desire to protect himself. If the actor's infliction of bodily harm upon the other or his invasion of any other interest of personality of the other is for the purpose of defending himself from bodily harm actually or apparently threatened by the other's conduct, it is privileged although the

actor's decision to defend himself is influenced, no matter how greatly, by personal dislike or hostility to the other. Thus the actor is privileged to use force to protect himself against an offensive touching threatened by a particular person whom he dislikes, although he would tolerate such a touching without resistance if threatened by a friend. On the other hand, the actor is not privileged if he uses the other's attempt to inflict a harmful or offensive touching upon him as a mere excuse for applying force to the other's person. Whether the one or the other situation exists may present a difficult question of fact.''

ILLUSTRATION:

''(a) *A* attempts to play a rough practical joke upon *B*. *B* is privileged to defend himself against *A's* attempt, although he has tolerated similar jokes played on him by others and objects to *A's* conduct because of personal dislike of *A*.

''The invasion of any of another's interests of personality is privileged only if inflicted for the purpose of preventing the other from invading one of the actor's interests of personality. Thus the infliction of bodily harm is not privileged although in fact its infliction is necessary to prevent the other from inflicting bodily harm upon the actor, if he is ignorant of the other's intent to inflict bodily harm upon him and therefore does not act for the purpose of preventing its infliction.

''Whether the other, whose intention to inflict an offensive touching or bodily harm upon the actor has been thus frustrated, has by his own fault deprived himself of the right to recover damages for the bodily harm inflicted upon him by the actor, is dealt with in that part of the Restatement which states principles which determine the extent to which contributory fault deprives one guilty thereof of the right to recover damages to which he would otherwise be entitled.''

ILLUSTRATION:

''(b) *A* points what appears to be a cane at *B* and addresses a gross insult to him. *B* to avenge the insult knocks *A* down. *B* is not privileged to do so, although the supposed cane is a disguised shotgun and *A* was attempting to shoot *B* and would have done so, had *B* not knocked him down.

''The privilege extends only to acts which are done for the purpose of protecting the actor from a presently threatened aggression. Therefore, it does not extend to acts done as punishment or in retaliation for a past aggression or attempt at aggression or as a warning against the repetition thereof. If the actor believes that the other's attempt to inflict bodily harm or an offensive touching upon him has been frustrated or abandoned he is not privileged to inflict any bodily harm or offensive touching upon the other. But the fact that the other has committed or attempted to commit an aggression upon the actor is a circumstance to be considered in determining whether the other's subsequent conduct gives the actor reason to believe that he intends to renew his aggression.''

ILLUSTRATION:

''(c) *A* strikes *B* with a cane. *B* by reasonable force disarms *A*. *B* is not privileged thereafter to inflict a similar beating upon *A*.''

COMMENT to clause (a):

''This privilege exists *if the other intends and the actor believes him to intend, or, although the other does not intend, the actor reasonably believes him*

to intend to cause a confinement or offensive touching of, or bodily harm to the actor, or to put him in apprehension thereof.''

ILLUSTRATION:

''(e) *A*, as a joke and intending not to strike but only to frighten *B*, draws back his hand as if to strike *B*, while within striking distance of *B*. *B* reasonably believing that *A* is about to strike him, seizes *A's* arm and in so doing accidentally scratches his hand severely. *B* is not liable to *A*.

''If the other's conduct is actually intended to cause bodily harm or an offensive touching to the actor or to put him in apprehension thereof, the actor's belief that it is so intended is usually reasonable, but it is immaterial whether it is or is not. If, however, the other's conduct is not so intended the actor is none the less privileged, if, but only if, he reasonably believes it to be so intended.

COMMENT to clause (b):

''The privilege exists, *if the other's conduct causes the actor reasonably to believe that it is likely to cause a confinement, or an offensive touching or bodily harm to him.*

''In determining whether the actor's apprehension of the intentional infliction of a confinement, bodily harm or touching is reasonable, the circumstances which are known, or should be known, to the actor must be such as would lead a reasonable man to entertain such an apprehension. In this connection, the qualities which primarily characterize a 'reasonable man' are ordinarily firmness and courage.

''The other's conduct may put the actor in a reasonable apprehension of bodily harm or an offensive touching, although it is not the sole cause thereof. The acts or statements of third persons may give to the other's conduct so threatening an appearance as to make it capable of causing such an apprehension, though standing by itself the conduct would not be capable of so doing.''

ILLUSTRATION:

''(1) *B* knocks *A* down under circumstances identical with those stated in Illustration (d), except that *C* has misled *B* into believing that *A* has threatened to shoot him on sight. If *B's* belief is reasonable he is not liable to *A*.

''The privilege stated in this Section in conditioned upon the actor's reasonable belief that the other's conduct is both intended and likely to inflict a confinement, an offensive touching or bodily harm upon him. But it is not necessary that the confinement, touching or harm which he apprehends shall be the same as that intended, or reasonably believed by the actor to be intended, by the other. The actor may know, or reasonably believe in the existence of, facts which are unknown to the other, which led him reasonably to apprehend consequences from the other's threatened conduct not realized by the other. Thus, the actor may be privileged to use force to prevent another from continuing a course of conduct which, while obviously intended only to frighten the actor, he reasonably believes, because of circumstances unknown to the other, to be likely to go beyond the other's intention and to cause an offensive touching of, or bodily harm to the actor.''

ILLUSTRATION:

''(j) *A* points a fire extinguisher at *B*, who is standing close to him and is on the point of pushing in the piston, believing that the extinguisher is empty, but also believing that *B* thinks it is full. *B* knows of *A's* belief in these

points, but reasonably believes the extinguisher to be full. *B* is privileged to forcibly prevent *A* from pushing the piston.''

Accord. *Stamps vs. Polk, et al.*, 143 Miss. 551, 108 So. 729

SECTION 84. THE INTENTIONAL USE AGAINST ANOTHER OF FORCE INTENDED OR LIKELY TO CAUSE DEATH OR SERIOUS BODILY INJURY, WHEN USED FOR THE PURPOSE OF PREVENTING THE OTHER FROM IMPOSING OR INFLICTING UPON THE ACTOR A LIKE HARM, IS PRIVILEGED, IF

(a) The other intends and the actor believes him to intend, or, although the other does not intend, the actor reasonably believes him to intend to cause a confinement or an offensive touching of, or bodily harm to, the actor, or to put him in apprehension thereof, and

(b) The other's conduct causes the actor reasonably to believe that it is likely to cause to the actor death or serious bodily injury, and

(c) The actor reasonably believes that the apprehended death or serious injury can be safely prevented only by the immediate use of force, * * * * *

(d) Except that the actor, though knowing that he can by so doing, safely avoid the necessity of using such force, is not required (i) to retreat if attacked by the other within his own dwelling place, unless it is also the dwelling place of his assailant, or (ii) to permit the other to intrude upon, or dispossess him of, his dwelling place, or (iii) to abandon an attempt to effect a lawful arrest, or (iv) (to submit to an unlawful arrest).

COMMENT: ''This section deals only with the privilege to use force intended or likely to cause death or serious bodily injury to another for the sole purpose of defending the actor from death or serious bodily injury. The use of such force may be privileged for the purpose of preventing certain crimes some of which do not threaten death or serious injury to the actor, (see Section . . . . to. . . .) or for the purpose of securing the apprehension of persons guilty of such crimes, or in the execution of a condemned criminal.

''The phrase 'serious bodily injury' is used in the sense stated in Section 82, Comment. For a definition of the terms 'intentional', 'intended', 'for the purpose of', 'reasonable apprehension', 'reasonably believes' and 'immediate', see Comment to Section 82.

COMMENT to clause (b):

''Except that the actor, before using force intended or likely to cause death or serious bodily injury, may be required to retreat or otherwise give up the exercise of some right or privilege, while he is not required to do so before using less dangerous force—the conditions under which the use of these degrees of force is privileged differ in only one particular. The privilege to inflict upon another an offensive touching or bodily harm less than death or serious bodily injury exists if the actor reasonably believes that the other's conduct threatens him with an offensive touching or bodily harm—however great or small—including at the one extreme, death, and at the other, the most trivial scratch. The privilege to use force intended or likely to cause death or serious bodily injury exists if, but only if, the actor reasonably believes that the other's conduct threatens him with death or serious bodily injury.

ILLUSTRATION:

''(a) *A* attempts to slap *B's* face. *B* is not privileged to shoot or stab

A to prevent him from doing so, although being much weaker than *A*, *B* cannot otherwise prevent *A* from slapping him.

"In all other respects, the conditions which are necessary to the existence of a privilege to use against another force intended or likely to cause death or serious injury are identical with those which are necessary to the existence of the privilege to use a less dangerous force which are stated in Section 82. Therefore the comment to that section is here pertinent.

"But while it is necessary for the existence of the privilege stated in this section that the actor believes that the other's conduct is intended to impose upon him a confinement or to inflict upon him an offensive touching or bodily harm or to put him in apprehension thereof and that it threatens him with death or serious bodily injury, it is not necessary that he shall believe that the other intends to bring about his death or to inflict serious injury upon him. The actor is privileged to use force intended or likely to cause death or serious bodily injury to prevent a 'battery' which he believes that another is about to commit upon him if he reasonably believes that it may result in death or serious bodily injury to him, although he realizes that the other is ignorant of the facts which make such a result probable and intends to commit a merely offensive or comparatively harmless, 'battery' upon him. So, too, the actor is privileged to use such force if he believes that another intends to commit an 'assault' upon him, but reasonably believes that the other's conduct, though obviously intended only to frighten him, is, because of circumstances unknown to the other, likely to go beyond his intention and cause death or serious injury to the actor."

ILLUSTRATION:

"(b) *A* is, to *B's* knowledge, ignorant of the fact that *B's* arm has been recently broken and that the fracture is not as yet perfectly well. *A* seizes *B's* arm and begins to twist it. *B* realizing, though *A* does not, that *A's* conduct is likely to re-break his arm, is privileged to use the same force to prevent *A* from continuing to twist his arm as though *B* believed that *A* intended thereby to break *B's* arm.

"On the other hand, the actor is not privileged to use against another, force intended or likely to cause death or serious injury to repel an attack which he believes is intended to cause him a similar harm, but which he realizes is incapable of accomplishing its purpose."

ILLUSTRATION:

"(c) *A* points a revolver at *B*. *A*, to *B's* knowledge, believes the revolver to be loaded and intends to shoot *B*. *B* knows the revolver is unloaded. *B* is not privileged to shoot *A* to prevent him from pulling the trigger.

"The use of force, intended or likely to cause death or serious bodily injury, is not privileged merely to prevent a confinment not itself threatening death or serious bodily injury. Thus, there is no privilege to use such force to prevent an unlawful arrest which another is attempting to effect otherwise than by the use of or threat of deadly weapons. Even though the arrest cannot be prevented by any other means, as where the vastly superior strength of the person attempting to arrest makes any other form of resistance absolutely futile. (The existence of a privilege to use deadly force in self-defense against deadly force which another threatens to use unless the actor submits to unlawful arrest, is considered in sub-clause iv).

"A person may attempt to effect the unlawful arrest of another, or to over-

come the other's resistance thereto, by the use of force intended or likely to cause death or serious bodily injury, and the other may have no opportunity to submit to the arrest and so avoid the necessity of using similar force in self-defense. In such a case the other may defend himself by the use of such force, not because its use is necessary to protect him from the unlawful arrest, but because it is the only way in which he can protect himself from death or serious bodily injury.

"One subjected to or threatened with an unlawful confinement, which involves a danger of death or serious bodily injury, is privileged to terminate or prevent the death or serious bodily injury. Here the use of such force would be privileged because it is necessary to prevent the death or serious bodily injury involved in the confinement and not because it is necessary to prevent the confinement as such. If a confinement threatens death or serious injury at some appreciably future time, the privilege to use such force exists only if the actor reasonably believes that he will have no later opportunity to escape before the death or serious injury becomes imminent. If he so believes, the actor, in accordance with the principles stated in Section 82 (c, i) and Comment, is privileged then and there to avail himself of what is apparently his last opportunity to avert the threatened loss of life or limbs.

ILLUSTRATION:

"(d) *A*, who is much larger and stronger than *B*, stands at the door of *B's* office and warns him that he will forcibly prevent *A* from leaving his office. *B*, realizing the impossibility of overpowering *A*, shoots *A* in order to effect his escape. *B* is not privileged to do so."

COMMENT to clause (c):

"As has been stated in Section 82, one whom another threatens to attack may stand his ground and repel the attack with any reasonable force which does not threaten death or serious injury, although he realizes that he can safely retreat and so avoid the necessity of using self-defensive force. But the interest of society in the life and efficiency of its members and in the prevention of the serious breaches of the peace involved in bloody affrays requires one attacked with a deadly weapon, except within his own dwelling place, to retreat before using force intended or likely to inflict death or serious injury upon his assailant, unless he reasonably believes that there is any chance that retreat cannot be safely made. But even the slightest doubt, if reasonable, is enough to justify his standing his ground, and in determining whether his doubt is reasonable every allowance must be made for the predicament in which his assailant has placed him."

ILLUSTRATION:

"(e) *A* is standing upon a public highway. *B* points a revolver at him and threatens to shoot him. If *A* can not prevent *B* from shooting him by any other means than by shooting *B*, he is privileged to do so.

Special Note: "There is a sharp conflict of authority on this point. There are a number of jurisdictions in which one actually or apparently threatened with an attack which is made with deadly weapons, or which otherwise involves danger to life or limb, may in any place await his assailant and use similar means of defense although he is absolutely certain that he can avoid the necessity by retreat.

"The view stated in this section is adopted not only because it is that of English common law and of a majority of American jurisdictions, but also because the interest of society in preventing deadly affrays and in preserving

the lives and efficiency of its members outweighs the interest which the individual assailed has in preserving his dignity by standing his ground."

COMMENT to clause (d) (i):

"The term 'dwelling place' is used in this section to denote any building or habitation, or part thereof, in which the actor is at the time temporarily or permanently residing and which is in the exclusive possession of the actor, or of a household of which he is a member. Only that part of the building or other habitation which is actually used for residential purposes is a dwelling place. Thus, a man's house is the dwelling place of himself, his family, his servants, and for the time being, the dwelling place of one who is, at the time, residing, however, temporarily, in the house as a guest. It does not include a visitor, social or business, who comes to the house for a particular purpose and not to reside therein. It includes a room or apartment in a hotel which the guest and his family are entitled to occupy exclusively. It does not include the lobbies, halls, or common rooms of a hotel or apartment house.

"A house, or even a room, may be the common dwelling place of more than one person. So also, in the case of a lodging house, a part of the house, such as the room occupied by the lodger, may be the exclusive dwelling place of the lodger although the residue of the house is the common dwelling place of his fellow lodgers, the proprietor and the proprietor's servants.

"One upon whom, while in his own dwelling place, another threatens an attack involving danger of death or serious injury may stand his ground and await his assailant and repel the attack even by force intended or likely to cause death or serious injury if he reasonably believes that a lesser degree of force will be unavailing, although he knows that he can with perfect safety escape his assailant by retreating and by so doing avoid the necessity of using such force. So, too, he may stand within his dwelling place and await his assailant, though he could prevent the assailant from attacking him by closing the door and so excluding the assailant from the premises.

"But the interest of society in preventing deadly affrays and in the security of the life and limbs of its members is so important that this privilege should not be extended any further. The mere fact that a man is threatened with an attack while he is within his own dwelling place does not justify him in using deadly weapons if he can avoid the necessity of so doing by any alternative other than flight or standing a siege. A man can no more justify using deadly weapons, if he can avoid the necessity of so doing by complying with a demand, other than a demand that he shall retreat, give up the possession of his dwelling place or permit the other to intrude thereon, when he is within his own home when the demand is made, than he can when the demand is made upon him upon a public highway.

ILLUSTRATION:

"(g) Under facts similar to those given in Illustration (f), except that *A* is standing in the vestibule of his dwelling house, *A* is privileged to stand his ground, await *B's* attack and shoot or stab him, although *A* could with perfect safety avoid *B's* attack by retreating to an inner room or by closing or locking the door of the vestibule.

Special Note: "There are in many jurisdictions cases which, while refusing to go to the length of permitting a man attacked in an open field to stand his ground and await an assailant, permit him to stand his ground if attacked within the curtilage of his dwelling place, within his business office or indeed within any building in which he has a right or privilege to be.

The considerations which are stated above as requiring the adoption of the view that one attacked in a public place must retreat, if by so doing he can with absolute safety avoid the necessity of defending himself by deadly weapons, also requires that the privilege to stand one's ground should be restricted to places in which retreat involves the surrender of some right which by tradition and custom has gained recognition of superlative importance.

"A man's dwelling place still preserves its traditional sanctity and part from the persistent line of authority which permits a man to stand his ground when attacked therein, the feeling that he should not be forced to flee from his house or even to barricade himself within it is still substantially universal. It may be that modern usage has attached to a man's business office a sanctity differing little from that which he attaches to his home, but it is clear that no logical distinction can be drawn between an attack made upon the street and an attack made in a hotel lobby in each of which the person attacked has merely the privilege to go and come as he pleases.

"The privilege of standing one's ground within one's own dwelling place in conferred not to protect one's proprietary interest in one's dwelling place as a piece of property, but to preserve it as one's final and sanctuary and place of refuge. It follows that the mere fact that a person it attacked within a building or room to the exclusive possession of which he is entitled gives him no privilege to stand his ground and await his assailant if he can with certainty of safety ecsape by retreat."

COMMENT to clause (d) (ii):

"It follows from the sanctity of a dwelling place that one whom another threatens with force likely to cause death or serious injury unless he surrenders to the other the possession of his dwelling place or permits the other to enter thereon, is not required to submit to the other's demand in order to avoid the necessity of defending himself by a similar force when the other's threatened attack becomes imminent."

ILLUSTRATION:

"(i) *A* comes to the door of *B's* house and drawing a revolver threatens to shoot *B* unless *B* surrenders the possession of his house. *B* may refuse to do so and if *A* attempts to carry out his threat, *B* is privileged to shoot *A* in self-defense.

COMMENT to clause (d) (iii):

"The actor *is not required to abandon an attempt to effect a lawful arrest although he knows that he can, by so doing, safely avoid the necessity of using such force.*

ILLUSTRATION:

"(k) *A*, peace officer, has in his possession a lawful warrant for the arrest of *B* on the charge of murder. He attempts to arrest *B* under the warrant. *B* draws his revolver and threatens to shoot *A* unless *A* desists. *A* is not required to abandon his attempt to arrest *B*, but is privileged to shoot *B* if *B* attempts to carry his threat into execution."

No civil cases dealing with the rule set forth in this section have been found, but the following criminal cases are in substantial accord therewith:

Clauses (b) and (c). Accord. *Green vs. State,* 28 Miss. 62; *Evans vs. State,* 44 Miss. 762; *Long vs. State,* 52 Miss. 23; *Bang vs. State,* 60 Miss. 571; *Fortenberry vs. State,* 55 Miss. 403. *Ingram vs. State,* 62 Miss. 142; *Godwin vs. State,* 73 Miss. 873, 19 So. 712; *Hall vs. State,* 1 So. 351; *Jackson vs. State,*

79 Miss. 42, 30 So. 39; *Blalack vs. State,* 79 Miss. 517, 31 So. 105; *McNeal vs. State,* 115 Miss. 678, 76 So. 625; *Johnson vs. State,* 140 Miss. 88, 105 So. 742.

Section 1230 Code of 1906 (Section 1009, Hemingway's Code), provides that, "the killing of a human being . . . . . shall be justifiable in the following cases . . . . . (e) when committed by any person in resisting any attempt unlawfully to kill such person or to commit any felony upon him . . . . . (f) when committed in a lawful defense of one's own person . . . . . where there shall be reasonable ground to apprehend a design to commit a felony or to do some great personal injury, and there shall be imminent danger of such design being accomplished."

The conduct on which the belief of the actor is founded must be an "overt act indicating a present intention to kill" the actor or to do him great bodily harm. *Dyson vs. State,* 26 Miss. 362; *Wesley vs. State,* 37 Miss. 527; 75 Am. Dec. 62; *Johnson vs. State,* 56 Miss. 430; *Kendrick vs. State,* 55 Miss. 436; *Scott vs. State,* 56 Miss. 287. While the danger should be apparently imminent, it is not essential that it should be immediate and impending at the very moment of the killing. *Cotton vs. State,* 31 Miss. 503.

Clause (d) (i). Accord. *McCall vs. State,* 29 So. 1003; *Long vs. State,* 52 Miss. 23; *Bang vs. State,* 60 Miss. 571; *Ellerbe vs. State,* 79 Miss. 10, 30 So. 57.

Clause (d) (ii). Accord. *Maury vs. State,* 68 Miss. 605, 9 So. 445.

Clause (d) (iii). Accord. *Maury vs. State,* 68 Miss. 605, 9 So. 445; *Spradley vs. State,* 80 Miss. 82, 31 So. 534.

Clause (d) (iv). Accord. *Maury vs. State,* 68 Miss. 605, 9 So. 445; *Spradley vs. State,* 80 Miss. 82, 31 So. 534.

In *Wilkinson vs. State,* 143 Miss. 324, 108 So. 711, it was said, "The courts generally hold that the right to resist an unlawful arrest is a phase of the right of self-defense; that as in other cases of self-defense the person sought to be arrested is justified in taking life only when he has reasonable ground to apprehend that he is in imminent danger of death or great bodily harm; that he is not justified in killing merely for the purpose of resisting an unlawful arrest or other restraint upon his liberty, where the only injury could be reasonably apprehended is an unlawful detention for a short time or other injury short of death or great bodily harm; that, the officer attempting to make an unlawful arrest is simply the aggressor in the difficulty, and stands in the shoes of any other aggressor in a like difficulty."

SECTION 88. IF THE ACTOR HAS CONSENTED TO ANY PARTICULAR INVASION OF ANY OF HIS INTERESTS OF PERSONALITY,

(a) He is not privileged to defend himself against such an invasion, unless his consent was obtained by fraud or has been withdrawn; but

(b) He retains his normal privilege of self-defense against any invasion not included within his consent.

COMMENT: "Mere provocation by words or conduct, no matter how insulting, does not destroy the privilege of self-defense, even though a reasonable man should realize that the provocation will probably induce the attack. But if the actor actually intends his provocative words or actions to induce an attack, they amount to a challenge, and, as such, to a consent similar to that given in a case of mutual affray. In the case of a fight or affray by mutual consent, each party gives consent to those blows from which he is unable

to protect himself. But each consents to the other using such force as is reasonably necessary to defend himself against his opponent's attack. In such a case there is no need of the privilege stated in this chapter, since the mutual consent to self-defensive force makes its use incapable of creating liability.

"The actor, although he has consented to a particular invasion, is privileged to defend himself against any violence which is in excess of, or different from, that which is normally incidental to such an invasion and which thus falls outside of this consent."

ILLUSTRATION:

"(a) *A* consents to *B's* performing an operation upon his arm under local anesthesia. As *B* is on the point of making the necessary incision *A*, without notifying *B*, changes his mind and forcibly wrests the knife from *B's* hand, thereby severely cutting one of *B's* fingers. *A* is liable to *B*."

If one provokes another to assault him when he is unarmed and with no intention of inflicting great bodily harm on the other, he is not thereby deprived of his right to defend himself against an attack with a deadly weapon. *State vs. Lucas*, 109 Miss. 82, 67 So. 851.

SECTION 89. (1) THERE IS NO PRIVILEGE TO APPLY ANY FORCE TO OR IMPOSE ANY CONFINEMENT UPON, ANOTHER WHICH IS IN EXCESS OF THAT WHICH THE ACTOR REASONABLY BELIEVES TO BE NECESSARY TO PREVENT THE INVASION OF ANY OF HIS INTERESTS OF PERSONALITY.

COMMENT: "In determining whether a particular force is or is not excessive, the amount of force exerted, the means or instrument by which it is applied, the manner or method of applying it and the circumstances under which it is applied are factors to be considered. There may, under ordinary circumstances, be a privilege to apply a particular amount of force, to apply it in a particular way, or to use a particular weapon, but the circumstances, which are known or which should be known to the actor, may be such as to indicate to a reasonable man in the actor's position that the use of this ordinarily privileged force may involve a danger of harm to the other which the actor is not privileged to inflict intentionally. Thus a man may be privileged to knock another down if the other threatens him with violence, both being upon a street or lawn, but he is not privileged to do so if the other is standing on the brink of a precipice or if he knows or should know that the other is suffering from heart disease.

"Whether a force is excessive depends upon the harm which the actor intends to cause, or the harm which he has reason to believe is likely to result. Thus, a force is excessive if the actor should realize that it is likely to do more harm than he either intends or is privileged to inflict. But a force does not become excessive because it unforeseeably results in a harm which the actor is not privileged intentionally to inflict.

"The actor must believe that the force which he applies is necessary to prevent the apprehended harm and not merely that it is likely to be effective in preventing it. Not only must the actor so believe, but, except where the force is actually necessary, the circumstances which are known or should be known to the actor must be such as to cause a reasonable man so to believe. In this connection the qualities which primarily characterize a 'reasonable man' are ordinary courage and firmness."

ILLUSTRATION:

"(a) *A* attempts to strike *B* with a cane. *B* has a shotgun in his hand and with it knocks the cane from *A's* hand bruising it badly. *B* is not liable to *A* since he has not used the gun in a manner intended or likely to cause death or serious injury.

"It follows that the actor is not privileged to apply a particular force if he knows or should know that the apprehended harm can be prevented by the application of a force less in kind or degree or in the harm which it is likely to bring upon the other, and this is so though the force applied is such as would be privileged if the actor reasonably believed that the apprehended harm could only be prevented by its use. In determining this, allowance must be made for the exigency in which the actor is placed by the other's conduct and the necessity for a rapid decision as to the means which he will use in own defense. Even the most reasonable men confronted with the necessity of defending himself against a real or apparent attack cannot be expected to measure accurately the exact amount of force necessary to repel it. It is only where there is a glaring discrepancy between the force applied and that which is actually necessary to prevent the apprehended harm, or where it is obvious that the actor knows or should know that he can defend himself by a lesser force that it is for the court to rule that the force applied is excessive. Otherwise it is for the jury to determine whether the force is or is not excessive."

ILLUSTRATION:

"(d) *A* attempts to strike *B* with his fists. *B* is not privileged to knock *A* down if he can easily prevent *A* from striking him by holding *A's* arm.

"If the actor reasonably believes that he can defend himself from the apprehended harm by any two or more of the means referred to in subsections 1 and 2, he may adopt any of these alternatives, unless the one adopted is intended or likely to cause and does cause a substantially greater harm to the other than is likely to result from the other or others.

"Thus one upon whom another attempts to inflict an offensive touching may prevent its infliction by imposing upon the other a brief and otherwise harmless confinement, though he might also prevent it by the application of very moderate force to the other's person, or vice versa. But he may not apply force intended to cause a very substantial bodily harm, though less than death or serious injury, even though he reasonably believes that no lesser force would be effective, if he should realize that he can prevent the apprehended touching by imposing on his assailant a brief and harmless confinement."

ILLUSTRATION:

"(h) *A* attempts to slap *B's* face. *B* can prevent *A* from doing so by either pushing *A* away or by leaving the room and locking the door and so confining *A*. *B* is privileged to do either."

"A confinement may be excessive not only if it is prolonged after all danger of bodily harm or an offensive touching is past but also if it is imposed under circumstances which make it unnecessarily disagreeable or dangerous to the person confined."

ILLUSTRATION:

"(j) *A* attempts to strike *B* while he is in *B's* office and pursues *B* to the door which *B* closes and locks. *B* may not continue *A's* confinement after he knows that *A* has abandoned his purpose."

Accord. *Bell vs. Morrison,* 27 Miss. 68; Lizana vs. Lang, 90 Miss. 469, 43 So. 477; *Spradley vs. State,* 80 Miss. 82; *Wicker vs. State,* 107 Miss. 690, 65 So. 885; *Davis vs. George,* 124 Miss. 808, 87 So. 274.

SECTION 90. IF THE ACTOR APPLIES A FORCE TO, OR IMPOSES A CONFINEMENT UPON, ANOTHER, WHICH IS IN EXCESS OF THAT WHICH IS PRIVILEGED, OR PUTS THE OTHER IN IMMEDIATE APPREHENSION THEREOF.

(a) The actor is liable for only so much of the force, confinement or apprehension as is excessive;

(b) The other's liability for an invasion of any of the actor's interests of personality which the other may have caused is not affected;

(c) The other has the normal privilege stated in this chapter to defend himself against the actor's use or attempted use of excessive force or confinement.

COMMENT: "While the actor is liable to another for any excess of force or confinement which he applies or imposes upon the other or for any apprehension in which he puts the other which is in excess of that in which he is privileged to put the other, he is not liable for so much of the force, confinement, or apprehension as he is privileged to apply, impose or cause, and so he does not become a 'trespasser *ab initio*' by his abuse of his privilege.

"While it is usually difficult to separate the harm done by the excess of force from that done by the privileged force, it can sometimes be done, as where an 'imprisonment' is continued, longer than is necessary to prevent the commission of a 'battery'."

"(a) *A* inflicts an offensive touching upon *B* and threatens to continue it. Being stronger than *A*, *B* can easily prevent a continuance of the touching by pushing *A* away. Instead of so doing he strikes him with a heavy cane inflicting serious injuries upon *A* by the excess of force which he has used in his own defense.

* * * * * * * * * * *

In *Davis vs. George,* 124 Miss. 808, 89 So. 274, wherein the plaintiff sought to recover damages for an assault and battery, and the defense was "self-defense', the trial court directed a verdict for the plaintiff, but the Supreme Court reversed its judgment saying that, "The testimony fails to show that the battery was so excessive or unreasonable as to deprive the appellant of the right to defend on the ground that the difficulty was provoked by the appellee".

In *Lizana vs. Lang,* 90 Miss. 469, 43 So. 477, the trial court instructed the jury for the defendant that, "If you believe from the evidence that plaintiff voluntarily entered into and provoked a quarrel with the defendant, and that plaintiff then and there used language inviting a fight, for the purpose of and calculated to the bringing on of a fight, then the plaintiff is entitled to nothing, and the jury should so find". The Supreme Court, in holding that the instruction should not have been given, among other things, said: "Even in a case where the plaintiff provokes a difficulty, if the battery is excessive or unreasonable, the fact that the difficulty was provoked by the plaintiff can afford no justification to the defendant."

In neither of these cases was the question of the defendant's liability for so much of the force used by him as was excessive, if any, presented for decision.

SECTION 96. THE INTENTIONAL INVASION OF ANY OF ANOTHER'S INTERESTS OF PERSONALITY IS PRIVILEGED WHEN INFLICTED FOR THE PURPOSE OF PROTECTING ANY THIRD PERSON FROM DEATH OR SERIOUS BODILY INJURY IF,

(a) The third person is privileged, or the actor, because of a reasonable mistake of fact, believes him to be privileged to inflict in his own defense a like invasion of personality, and

(b) The actor's intervention is necessary, or the actor, because of a reasonable mistake of facts, believes it to be necessary, to protect the third person from death or serious bodily injury.

COMMENT: "This section states only the condition under which the use of force intended or likely to cause death or serious injury to another is privileged for the purpose of defending a third person from bodily harm. The use of such force may be privileged for other purposes. Indeed, it is rare that a situation arises in which the privilege stated in this section is needed. In the majority of cases in which force is intended or likely to cause death or serious injury is applied, the third person's bodily security is imperiled by an act which is actually or apparently not only a crime, but a crime of such a sort that the actor is privileged to kill or inflict serious bodily injury if necessary to prevent its commission.

ILLUSTRATION:

"(a) *A* sees *B* apparently about to intentionally shoot *C*, a stranger to *B*. *A* forcibly disarms *B* and in so doing injures *B's* arm. *A* is not liable to *B*.

Accord. *Staten vs. State*, 30 Miss. 619; *Little vs. State*, 87 Miss. 512, 40 So. 625; *McNeil vs. State*, 115 Miss. 678, 76 So. 625; *McGehee vs. State*, 138 Miss. 822, 104 So. 150.

Section 1230, Code of 1906 (Section 1009, Hemingway's 1927 Code), provides that, "The killing of a human being * * * shall be justifiable * * * when committed in the lawful defense of * * * in * * * human being, where there shall be a reasonable ground to apprehend design to commit a felony or to do some great personal injury, and there shall be imminent danger of such design being accomplished."

SECTION 101. THE USE OF A MEANS INTENDED OR LIKELY TO CAUSE DEATH OR SERIOUS BODILY INJURY TO ANOTHER, WHEN USED SOLELY FOR THE PURPOSE OF PREVENTING OR TERMINATING THE OTHER'S INTRUSION UPON THE ACTOR'S POSSESSION OF REAL OR PERSONAL PROPERTY, IS PRIVILEGED IF, BUT ONLY IF, THE ACTOR REASONABLY BELIEVES THAT THE INTRUDER, UNLESS EXPELLED OR EXCLUDED, IS LIKELY TO CAUSE DEATH OR SERIOUS BODILY INJURY TO THE ACTOR OR TO A THIRD PERSON WHOM THE ACTOR IS PRIVILEGED TO PROTECT.

COMMENT: "The phrase 'serious bodily injury' is used in the sense as defined in the Comment to Section 82.

"The privilege stated in this Section is given, not so much for the purpose of protecting the possession of property from intrusion, as for the purpose of protecting the occupiers or users thereof from death or serious bodily injury by preventing such intrusions as involve the danger of bringing about such results. It is closely analogous to the privilege stated in Section 84. It differs from that privilege in that the danger need not be so imminent as to justify the infliction of death or serious injury under Section 84. It exists

even though it is obvious that an appreciable interval of time must elapse between the intruder's entry and the infliction of the harm which he apparently intends to inflict, or which he is likely to bring about.

"As in the case of the privilege to use force intended or likely to cause death or serious bodily injury in self-defense against bodily harm, the privilege stated in this section is rarely necessary to relieve the actor of liability. In the great majority of cases in which the use of such force has been held to create neither criminal responsibility nor liability to pay damages to another injured thereby, the intrusion, for the prevention of which the force was used, was such as amounted to a crime for the prevention of which even the infliction of death or serious bodily injury is privileged and therefore the privilege stated in this section was not necessary to release the actor from liability.

"This section applies to the use of force intended or likely to cause death or serious bodily injury for the purpose of preventing or terminating an intrusion upon every kind of property. One is no more privileged to use of such force to prevent another from intruding upon his dwelling place than he is to use similar force to prevent the other from intruding upon his possession of any other real or personal property. In either case, he may use such force if the intrusion threatens death or serious bodily injury to occupiers or users of the property. In neither case may he do so unless the intrusion threatens such consequences. But while one is not entitled to use such force to prevent harmless intrusion even upon his dwelling place, he may, as is stated in Section 84 (c, ii), defend himself by such force against a similar force which another threatens to apply to him unless he permits the other to enter his dwelling place, even though he knows that he can avoid the necessity of so doing by permitting the other to enter."

ILLUSTRATION:

"(a) *A* comes to *B's* premises during a severe storm and asks permission to take shelter in *B's* dwelling house. *B* refuses to permit *A* to do so, although he knows that *A* neither intends nor is likely to harm any person or thing in the house. *A*, a much larger man than *B*, attempts to overcome *B's* resistance by physical force which *B* is unable to resist except by shooting *A*. *B* is not privileged to do so to prevent *A* from entering his dwelling place.

"While this section states only the conditions under which force intended or likely to cause death or serious injury is privileged for the purpose of preventing or terminating an intrusion when inflicted solely for the purpose of terminating the other's intrusion, it applies equally to the imposition of a confinement intended or likely to cause similar results. The force used in preventing or terminating an intrusion often involves as an incident a temporary confinement, as where the actor forcibly leads an intruder from his premises. A possessor of property rarely prevents an intrusion by confining the would-be intruder without any application of force to his person. It is difficult to conceive of a situation to which a confinement unaccompanied by force to the person could be used to terminate an intrusion.

"It is exceedingly rare that a confinement, apart from the physical force by which it is imposed, threatens death or serious injury. If such a case should occur, the principles which are stated in this section would apply.

Accord. *Ayers vs. State,* 80 Miss. 709; *Boykin vs. State,* 86 Miss. 481, 38 So. 725; *Cotton vs. State,* 135 Miss. 792, 100 So. 383.

Section 1230, Code of 1906 (Section 1009, Hemingway's 1927 Code), provides that, "The killing of a human being . . . . . shall be justifiable . . . . .

when committed by any person in resisting any attempt . . . . . to commit any felony . . . . . upon or in any dwelling house in which such person shall be.'' This statute does not justify a killing to prevent a mere trespass or the commission of larceny. *McDaniels vs. State,* 2 S. & M. 401, 47 Am. Dec. 93.

RESTATEMENT NO. 3

SECTION 110. ''FORCIBLE ENTRY'', AS USED IN THIS CHAPTER, IS THE ACTOR'S ENTRY UPON REAL PROPERTY IN THE POSSESSION OR CUSTODY OF ANOTHER, WHETHER FOR THE PURPOSE OF REGAINING POSSESSION OR FOR ANY OTHER PURPOSE, WHICH IS EFFECTED BY THE USE OF FORCE AGAINST THE OTHER, OR BY BREAKING INTO THE PROPERTY.

COMMENT: ''A forcible entry is usually made for the purpose of regaining possession of real property. The original English statutes of Forcible Entry and Detainer and the American statutes, which re-enact them with occasional variations, are directed against an entry made for this purpose. The term 'forcible entry' in this chapter is, however, used to include, not only an entry made for the purpose of regaining the possession of real property from one wrongfully withholding it from the actor, but also any entry made upon such property for any purpose.

''In this section, as throughout this chapter, the word 'another' includes not only the person in possession of the real property upon which the entry is effected, but also any person who is in occupation of the premises as the representative of such person, and any third person assisting such other in protecting his possession from entry.

''The word 'breaking' is used in this chapter in the same sense in which it is used in defining the crime of burglary, and includes the breaking or destruction of any portion of the outer part of a building or enclosure, used for its protection, or the change in location of any such part, such as the moving or pushing aside of any object placed there as a barrier.

''It is not within the scope of the restatement of this subject to define possession or custody or to state the precise boundary between the two. It is only necessary to state that for the purposes of this chapter one holding or occupying real property for and in the right of another has the mere custody of the property, the other having the possession.''

NOTE: Section 3375, Code of 1906 (Hemingway's 1927 Code, Section 3511), et seq., provides the usual remedy for an unlawful entry on a detainer of real property; but neither it nor any other Mississippi statute makes it a crime to use force to regain possession of real property. The only Mississippi decision dealing with the use of force to recover the possession of real property is *Glenn vs. Caldwell,* 74 Miss. 49, 20 So. 152, wherein the question was not presented for decision, but in the course of its opinion the court said, ''At the common law, forcible entry was an offense, and punishable as such''.

SECTION 128. THE USE OF FORCE AGAINST ANOTHER FOR THE PURPOSE OF RECAPTION IS NOT PRIVILEGED UNLESS THE OTHER:

(a) Has tortiously taken the property from the actor's possession or custody (i) Without claim of right, or (ii) Under claim or right, but by the use of force against the actor, or by duress or fraud, or

COMMENT: "This section states the manner in which the property must be acquired by the other in order that the actor may be privileged to use force to retake it. As is stated in the last paragraph of the Comment to Section 127, the privilege of forcible recaption also exists, although the other has not so acquired the property, if he knowingly causes the actor to believe that he has so acquired it.

COMMENT to clause (a):

"To create the privilege of forcible recaption, it is enough that the other has acquired possession of the property tortiously and without claim of right.

"*Special Note*: The phrase commonly used to describe this situation is what the article must be taken 'wrongfully and without claim of right'.

" 'Tortiously' refers to the commission of a tort, although the act may also involve a crime or other wrong. Any unprivileged taking of property from the actor's possession without his consent is a tort, but this alone is not enough to create a privilege to retake the property thus tortiously taken. The property must be taken not only without the actor's consent but also without any claim of right, or, if taken under a claim of right, the taking must be accomplished by some tort other than that which consists only of taking the property from the actor's possession without his consent. Thus the term 'tortiously' is here used as referring to the unprivileged taking of personal property without the consent of the owner.

"It is not necessary that a chattel be taken by actual violence from the grasp of the actor or even that it be taken without his consent, no actual violence being used; it is enough that its possession is obtained by the fraudulent misrepresentation made by the other which induces the actor to give the chattel to him. Nor is it necessary that there be an active misrepresentation. The actor, if he acts promptly, is privileged to use force to retake the chattel if the other, knowing that the chattel is given to him for a particular purpose, receives it with the intention of putting it to some other use, having no honest belief that he is entitled to put it to such use, irrespective to the actor's wishes.

Caveat: "Section 128 and Comment thereto are intended to express no opinion as to the existence of a privilege of recaption, if the other, having received a chattel for a particular use, subsequently gives the actor reason to believe that he intends to put it to some other use which will be irreparable injury to the actor."

One unlawfully taking property from another under the mistaken belief that the property is his and has been stolen by the other, subjects the one to liability to the other, although he acted in good faith. *Dixon vs. Harrison Naval Stores, Inc.*, 143 Miss. 368, 109 So. 605.

SECTION 146. SUBJECT TO THE CONDITIONS STATED IN SECTIONS 152 TO 157, A PRIVATE PERSON IS PRIVILEGED TO ARREST ANOTHER WITHOUT A WARRANT FOR A CRIMINAL OFFENSE:

(a) If the other has committed the felony for which he is arrested, or
(b) If an act or ommission constituting a felony has been committed and the actor reasonably suspects that the other has committed such act or omission, or
(c) If the other, in the presence of the actor, has committed or is committing a breach of the peace or an attempt to commit a felony and the arrest is made at once or upon fresh pursuit, or
(d) If the other knowingly causes the actor to believe the facts exist which

would create in him a privilege to arrest under the principles stated in Clauses (b) or (c).

Caveat to Clause (b): "No case has been found which decides whether or not a private individual may arrest another upon suspicion that the other has attempted to commit a felony, the attempt having been made by a third person.

This restatement expresses no opinion as to whether such a privilege should or should not exist. The question can only arise if an attempt to commit a felony it not itself a felony."

COMMENT: "The term 'a private person' means any person other than a peace officer irrespective of whether he is or is not a citizen of the state or resident therein. The privileges peculiar to peace officers are stated in Section 148.

"The privilege to arrest without a warrant is not defeated merely by the fact that there is opportunity to secure a warrant, although the failure to obtain a warrant may be significant in determining the reasonableness of the conduct of one arresting another upon suspicion.

"Except as stated in Section 147, an arrest in civil proceedings is not privileged unless made under a warrant.

"This section states the privilege which the private person has at common law to arrest another, without a warrant, for a criminal offense. There are statutes in some states which give a wider privilege to private persons. See tentative draft of a Code of Criminal Procedure, Section 16 (1) and comment, Clause III, pages 104-105."

COMMENT to clauses (a) and (b):

"The principles stated in this section apply not only if the act constituting the felony is committed in the state in which the arrest is made but also if it is committed in a state of the United States other than that in which the arrest is made and is a felony in the state in which it is committed, it being immaterial whether or not it is a felony in the state in which the arrest is made. Nor is it necessary that the arrest be made upon a request from the public authorities of the state in which the felony has been committed."

Caveat (to rule stated in Comment): "There is no American case which discusses the existence of a privilege to arrest without warrant a fugitive who has committed a felony in a foreign country. This restatement does not express any opinion as to existence of such a privilege.

"*Special Note*: The rule stated in the Comment to Clauses (a) and (b) is usually expressed by the statement that there is a privilege to arrest without a warrant a fugitive who has committed a felony in another state or is suspected of having done so. The word 'fugitive', however, is not only used in its normal sense of a person who is fleeing from the state in which the felony has been committed in order to avoid arrest therein, but is also applied to persons who have, for any purpose, come into the state in which the arrest is made.

"The privilege to arrest another who is guilty of the felony for which the arrest is made or who is reasonably suspected of having committed the felony for which he is arrested, exists only if he has committed or is suspected of having committed an act constituting a felony which is punishable at the time of the arrest. Thus there is no privilege to arrest one who has previously committed a felony as to which he has been acquitted, convicted, or pardoned. Similarly, there is no privilege to arrest a person on suspicion of his having committed a felony as to which, to the knowledge of the actor, he

has been convicted, acquitted, or pardoned, or against which the statute of limitations has run.''

COMMENT to clause (a):

''As is stated in Clause (b) the actor is privileged to arrest on suspicion of felony if the felony has been committed and he has reasonable grounds to believe that the other has committed it. If, however, he arrests another for a particular felony and the other has actually committed that felony, it is immaterial that his suspicion is based upon grounds which would not be sufficient to create suspicion in the minds of reasonable men. This is an application of a principle which has been sated as applicable to all the privileges in which reasonable belief or suspicion is an essential element.

Special Note: ''As Clause (a) is worded the privilege given to a private person is to arrest for the very felony committed. It differs from Clause (b) only in that the actor's belief in the other's guilt, although it turns out to be correct, may have been based on grounds which would not have caused such a belief in the mind of a reasonable man. This principle is in conformity with the statement constantly made in regard to other privileges, that, if a brief turns out to be correct, it is immaterial that the grounds of it are insufficient to make it reasonable. Therefore Clause (a) must be correct, unless all the previous statements are incorrect or unless there is some peculiarity in the privilege to arrest, which differentiates it from all other privileges.

''There are cases which say that any person, whether peace officer or private individual, is privileged to arrest another without a warrant if the other has committed a felony. Upon investigation of these cases it will be found that the person arrested was guilty of some other felony, or a misdemeanor, for which the officer would have been privileged to arrest him without a warrant. This indicates that an arrest may only be made for the cause given. If this is so where there is a warrant, it should *a fortiori* be true where the arrest is made without a warrant.

''The arrest made in cases here cited were by officers and not by private persons, but are cited under this section for the reason that the rule governing arrests without a warrant is the same for public officers as for private persons, both under the statutes hereinafter cited and under restatement, Section 148.''

Clause (a). Accord. *White vs. State,* 70 Miss. 253; *Pickett vs. State,* 137 Miss. 529, 104 So. 358; *Kennedy vs. State,* 139 Miss. 579, 104 So. 449; *Love vs. State,* 142 Miss. 602, 107 So. 667; *Ingram vs. State,* 146 Miss. 303, 111 So. 362.

The legislature has full power to classify an offense either as a misdemeanor or as a felony. *Moore vs. State,* 138 Miss. 156, 103 So. 485.

Section 1578, Code 1906 (Section 1410, Hemingway's 1927 Code), provides that, ''The term 'felony' when used in any statute shall mean any violation of law punishable with death or confinement in penitentiary''.

COMMENT to clause (b):

''If no felony has been committed, one not a peace officer is not privileged to make an arrest under Clause (b), although he reasonably suspects that a felony has been committed and that the other has committed a felony. The privilege of a peace officer, additional to that stated here, is stated in Section 148.''

ILLUSTRATION:

''(a) A bill has been posted offering a reward for the apprehension of a person who is stated to have murdered *A* and of whom the bill gives a detailed

description. *B* reasonably believes that *C*, whose appearance closely corresponds to the description given in the bill, is the alleged murderer. Irrespective of whether *B* is a private person or a peace officer, he is privileged to arrest *C if A* has in fact been murdered, although *C* is not the person who murdered *A*. Unless *B* is a peace officer, he is not privileged to arrest *C* if it is subsequently discovered that *A* was not murdered but committed suicide.

"In order that a private individual may be privileged to arrest another on suspicion of felony it is necessary that an act or omission actually constituting a felony has been committed and that the actor reasonably suspects that the other whom he arrests has committed that act or omission and therefore has committed a felony. It is not enough that the actor, if a private citizen, believes no matter how reasonably that a felonious act has been committed and that the other has committed it. Not only must the act, of which the actor suspects the other, have been committed but the act must be a felony. The fact that an act has been committed and that the actor through a mistake of law or fact reasonably believes such act to be a felony does not give him any privilege to arrest another whom he knows or reasonably suspects of having committed the act, and this is so although the act, while not a felony, is a breach of the peace or misdemeanor. Thus where the other has stolen a watch worth $1.00, a misdemeanor, the actor knowing of such theft is not privileged to arrest the other for it, although he believes that the watch is of the value of $50, in which case a felony would have been committed or believes that the theft of a $1 watch is a felony. A *fortiori* a mistake of law as to his privilege to arrest for a misdemeanor does not affect his privilege.

"In order that the actor may 'reasonably suspect' the other of having committed acts which constitute a felony which has in fact been committed, it is not necessary that the actor shall believe that the other is guilty of the felony. It is enough that the circumstances which the actor knows or reasonably believes to exist are such as to create a reasonable belief that there is a likelihood that the other has committed the felony. In such case, the public interest in the punishment of a felony requires the other's arrest for the purpose of securing his custody pending investigation.

If, to create the privilege, it were necessary that the actor should reasonably believe that the one arrested is guilty of a felony—that is, that there is no substantial chance that the other has not committed it—neither of two men could be lawfully arrested for a crime, except by warrant, although it is clear at the time of the arrest that one of them is guilty and that the guilty one may escape unless both are arrested. The nature of the crime committed or feared, the chance of the escape of the one suspected, the harm to others to be anticipated if he escapes and the harm to him, if he is arrested, are important factors to be considered in determining whether the actor's suspicion is sufficiently reasonable to confer upon him the privilege to make the arrest."

ILLUSTRATION:

"(b) *A* sees *B* and *C* bending over a dead man *D*. *B* and *C* each accuse the other of murdering *D*. *A* is not sure that either *B* or *C* did the killing, but but believes that one but not both, has done so. *A* has reasonable suspicion that *B* or *C* killed *D* and is privileged to arrest either or both.

"What constitutes a reasonable suspicion upon a given set of facts is a question for the court and not the jury.

Special Note to Clause (*b*): "At common law a private citizen was privi-

leged to arrest another even though no felony had been committed, provided he was taking part 'in hue and cry' against such other. This privilege has never existed in the United States except in a very few jurisdictions. Justified at a time when there were few peace officers and therefore prompt action by private citizens was necessary for the apprehension of criminals, it is no longer required under modern conditions.

The felony must have been committed and the reasonable belief that the person arrested is the person who committed the felony must rest on evidence sufficient to justify it. *Spradley vs. State,* 80 Miss. 82, 31 So. 534.

In *Vice vs. Holley,* 88 Miss. 572, 41 So. 7, it was said that, "Any officer making an arrest, acts at his own peril, and if he makes a mistake, and arrests the wrong person, however, innocently he may have acted, he is liable, unless the party complaining has brought the injury upon himself by misstatements and misrepresentations which led to the arrest". In that case the arrest was made by comparing the description of the person who committed the crime with the person arrested. To the same effect is *King vs. State,* 147 Miss. 31, 113 So. 173.

COMMENT to clause (c):

"If the other, in the presence of the actor, has committed or is committing a breach of the peace or an attempt to commit a felony and the arrest is made at once or upon fresh pursuit."

ILLUSTRATION:

"(c) *A* sees *B* commiting a violent and unprovoked attack upon *C* in a public street. Irrespective of whether *A* is a peace officer or a private citizen, he is privileged to arrest *B* and either give him into the custody of a peace officer or himself take *B* before a magistrate for commitment.

"The term 'in the presence of the actor' means that the actor by the use of his senses knows that the other is committing the act which constitutes the breach of the peace or the attempt to commit a felony. It is not enough that the act is done in the neighborhood of the actor; he must be aware of its commission. On the other hand, it is not necessary that the act be done in the actor's immediate neighborhood. If the actor, by the use of his senses, perceives that an act is being done and forthwith investigates and finds that the act constitutes a breach of the peace, he is privileged to arrest under this clause."

ILLUSTRATION:

"(e) *A,* while passing *B's* house, hears a woman's scream, he rushes into the house and discovers that the woman was screaming because *B* was beating her. *A* is privileged to arrest *B.*

"Where a breach of the peace is committed in the actor's presence, he is privileged to arrest the one committing it, provided the arrest is made at once, or the actor promptly takes steps to apprehend the other. If the other flees or otherwise leaves the place, the actor is privileged to arrest him at any time during a pursuit, promptly begun and continuously maintained. The continuity of the pursuit is not broken by temporary and unavoidable interruptions, such as those which are necessary to satisfy the wants of nature."

ILLUSTRATION:

"(f) *A,* peace officer, sees *B* and *C* engaged in a mutual affray. He runs toward them. *B* and *C* both flee in different directions. *A* pursues *B* whom he arrests after a short pursuit. *A* is privileged to do so. He thereupon goes

in search of *C*. *C* has disappeared and *A* makes inquiries as to his whereabouts and discovers that he has gone to a distant suburb of the city. He stops for a quarter of an hour to get his supper and then takes a taxicab and follows *C*, whom he eventually finds some three or four hours later. *A* is then privileged to arrest *C*.

"Although one is not privileged to arrest another who has committed a breach of the peace, unless the act is done in the actor's presence, he is privileged to assist a third person who is endeavoring to make an arrest for a breach of the peace committed in the latter's presence. See Section 164.

"To create the privilege to arrest another, it is not enough that the actor —whether a private person or a peace officer—reasonably suspects that the other is committing a breach of the peace, except as stated in Clause (d), and in Section 148 (b, ii) where the actor is a peace officer and he arrests a participant in an affray. If in fact no breach of the peace has been committed, a mistaken belief on the part of the actor, whether induced by a mistake of law or of fact and, however reasonable, that a breach of the peace has been committed by the other, does not confer a privilege to arrest under this clause.

ILLUSTRATION:

"(g) *A*, a private person, sees *B* and *C* fighting. Reasonably believing it to be a mutual combat, *A* arrests both *B* and *C*. In fact *B* was acting in self-defense. *A's* arrest of *B* is not privileged.

Were *A*, a peace officer the arrest would have been privileged under Section 148 (b, ii).

"The actor is privileged, under the same conditions which create the privilege to arrest for a breach of the peace, to arrest another who in his presence has done or is doing an act constituting an attempt to commit a felony. This is so, irrespectively of whether, in the State in which such act is done, such attempt is a felony or only a misdemeanor.

"What constitutes a criminal attempt is not within the scope of the restatement of this subject.

"Except by statute, there is no privilege to arrest another without a warrant for a misdemeanor unless the misdemeanor is a breach of the peace or an attempt to commit a felony. For a list of statutes giving such a privilege to private persons see Tentative Draft of a Code of Criminal Procedure, Comment to Section 16.

"The privilege to use force, not involving an arrest, for the purpose of preventing crime is stated in Chapter 8."

Section 23 of the constitution, which provides that, "The people shall be secure in their persons, houses, and possessions, from unreasonable seizure or search", etc., prohibits an officer from arresting for a misdemeanor not committed in his presence. *Orick vs. State*, 140 Miss. 184, 105 So. 465. An arrest for a misdemeanor cannot be made by an officer without a warrant unless committed in his presence. *Butler vs. State*, 136 Miss. 885, 101 So. 193; even though the person arrested has, in fact, committed a misdemeanor and the officer has been so informed. *Iupe vs. State*, 140 Miss. 279, 105 So. 30. The term "in his presence" means that the officer has become conscious, through his senses, of the commission of the crime committed. *Moore vs. State*, 132 Miss. 156, 103 So. 485.

A person transporting intoxicating liquor in kegs, in an automobile, may be arrested by an officer without a warrant on his admission that the kegs

contain intoxicating liquor, the transportation of which is a misdemeanor. *Williamson vs. State,* 140 Miss. 841, 105 So. 479.

Where the possession of a suitcase which an officer suspects, but does not know to contain intoxicating liquor, the officer is not privileged to take possession of the suit case, and, on discovering that it contains intoxicating liquor, the possession of which is a misdemeanor, to arrest, without a warrant, the person from whom the suit case was taken. *Webb vs. The town of Sardis,* 143 Miss. 92, 108 So. 442.

Where an officer throws a flashlight on another in the street at night thereby discovering that the other is carrying a concealed weapon, which is a misdemeanor, the official is privileged to arrest him, without a warrant. *Daniels vs. City of Gulfport,* 146 Miss. 517, 112 So. 686.

In *White vs. State,* 70 Miss. 253, 11 So. 632, it was said that, "What is fresh pursuit must be determinable by circumstances, and where, as in this case, a felony is committed at night, discovered in the morning and the officer immediately follows and overtakes the felon, who is attempting to escape, it is not necessary that he shall have a warrant for his arrest."

COMMENT to clause (d):

If the other knowingly causes the actor to believe that facts exist which would create in him a privilege to arrest under the principles stated in Clauses (*b*) or (*c*).

" 'Knowingly', as used in this clause, means that the other either intends his conduct, whether of act or omission, to induce the actor to believe in the existence of facts which create the privilege to arrest him, or as a reasonable man should realize that his conduct creates a substantial probability of inducing the other so to believe.

ILLUSTRATION:

"(h) *A* is murdered by *B*. *C, B's* wife, in order to give *B* opportunity to escape, draws suspicion upon herself, thus leading *D* to believe her guilty of the murder of *A*. *D* is privileged to arrest *C*."

Accord. *Vice vs. Holley,* 88 Miss. 572, 41 So. 7.

Section 1444, Code of 1906 (Section 1262, Hemingway's 1927 Code), provides that arrests for crime may be made by the sheriff, his deputy, a constable, a conservator of the peace, a marshal or policeman of a city, town, or village, and by private persons.

Section 1447, Code of 1906 (Section 1265, Hemingway's 1927 Code), provides that, "An officer or private person may arrest any person without a warrant, for an indictable offense committed, or a breach of the peace threatened or attempted in his presence; or when a felony has been committed, and he has reasonable ground to suspect and believe the person proposed to be arrested to have committed it; or on a charge, made upon reasonable cause, of the commission of a felony by the party proposed to be arrested. And in all cases of arrests without warrant, the person making such arrest must inform the accused of the object and cause of the arrest, except when he is in the actual commission of the offense, or is arrested on pursuit." The term "indictable offense" means an offense for which a grand jury may indict; and does not include a violation of a municipal ordinance. *Letow vs. U. S. Fidelity & Guaranty Co.,* 120 Miss 763, 83 So. 81.

Section 1451, Code of 1906 (Section 1269, Hemingway's 1927 Code) provides that, "Officers and others who make arrests as authorized or required

by law, shall not be liable on account thereof, civilly or criminally, notwithstanding it may appear that the party arrested was innocent of any offense.

SECTION 148. SUBJECT TO THE CONDITIONS STATED IN SECTIONS 152 TO 157, A PEACE OFFICER ACTING WITHIN THE LIMITS OF HIS APPOINTMENT IS PRIVILEGED TO ARREST ANOTHER WITHOUT A WARRANT.

COMMENT: "The term 'peace officer' is defined in Section 141.

"A peace officer may be appointed to act anywhere within the limits of a state or nation or may be appointed to act only within a limited district, he has no greater privileges outside of such district than a private citizen.

ILLUSTRATION:

"(a) *A* is appointed to act as a peace officer within the city of X. He has reasonable grounds to believe that *B* has been murdered and that *C* has murdered him. *A* is not privileged to arrest *B* outside the limits of the city of X if *C* has not been murdered but has committed suicide.

"On the other hand, a peace officer may arrest on reasonable suspicion that a felony has been committed in another state if the arrest is made within the territory within which he is appointed to act. See Comment to Clauses (a) and (b) of Section 146. While it is not necessary that the arrest be made upon request from the authorities of the state in which it is suspected that the felony was committed, such a request is sufficient, except under extraordinary circumstances, to create a reasonable suspicion."

ILLUSTRATION:

"(b) *A*, a chief of police of the town of M in the State of N receives a telegram from the chief of police of the town of X in the State of Y, requesting him to arrest *B*, whom the telegram states to have murdered *C* at X. *A*, or any peace officer acting under his instructions is privileged to arrest *B* without a warrant.

"A peace officer may be appointed to make arrests only for certain acts; if so, in arresting for other acts his privilege is only that of a private citizen."

ILLUSTRATION:

"(d) A statute confers upon the agents of Society for the Prevention of Cruelty to Animals, the privilege to arrest persons guilty of violating statutes or ordinances prohibiting cruelty to animals. *A* is privileged to arrest *B*, whom he sees beating his horse immoderately. *A* is not privileged to arrest *C* whom he reasonably suspects of having murdered *D* if in fact *D* has not been murdered but has committed suicide."

See cases and statutes cited under Section 146.

Section 1447, Code of 1906 (Section 1265, Hemingway's 1927 Code), cited under Section 146, provides when an arrest may be made by an officer without a warrant.

Section 2, Chapter 244, Laws 1924 (Section 2239, Hemingway's 1927 Code), authorizes peace officers to search vehicles and boats in which they have reason to and do believe that intoxicating liquor is being transported in violation of law, and to arrest the person or persons in possession or control thereof in event intoxicating liquor should be found therein.

In *Moore vs. State*, 138 Miss. 116, 103 So. 483, a telephone message by one officer to another that an automobile containing whiskey was approaching and would pass over a certain bridge, giving a description of the automobile, including its tag number, was sufficient to justify the officer who

received the information and who believed that the officer giving it was a credible person, in believing that intoxicating liquor was being transported in the automobile and in stopping it when it arrived at the bridge and arresting the driver thereof, a search of the automobile then made disclosing that whiskey was being transported therein.

SECTION 152. THE ARREST OF ANOTHER IS NOT PRIVILEGED UNLESS THE ACTOR MAKES THE ARREST FOR THE PURPOSE OF BRINGING THE OTHER BEFORE A COURT, BODY OR OFFICIAL OR OTHERWISE SECURING THE ADMINISTRATION OF THE LAW.

COMMENT: "The statement in this section is in accordance with the principle common to most, if not all, privileges that an act, to be privileged, must be done for the purpose of protecting the interest for which the privilege is given. The doing of an act upon a privileged occasion is normally sufficient evidence that the act is done for a proper purpose. So too, is the fact that the actor has followed up the arrest by taking appropriate steps to bring the person arrested before a proper court. In both cases, where upon the evidence the actor's purpose is doubtful, the other must establish the existence of an improper purpose. If the actor has followed up the arrest by taking the proper steps to bring the person arrested before the proper tribunal, the burden is upon the other to show that such conduct was an afterthought.

"If, however, the actor makes the arrest for the purpose stated in this section, the fact that he has an ulterior motive in making it, does not make the arrest unprivileged."

ILLUSTRATION:

"(a) *A*, a traffic officer, arrests *B* for driving at the rate of 20 miles an hour through a town in which the rate of speed is fixed by an ordinance at 15 miles an hour. He has previously permitted a great number of persons driving at 25 miles per hour to go unarrested. *A* is privileged to arrest *B*, although he did so because *B* was a personal enemy, or because *B* had previously reported him for his failure to arrest persons driving at 25 miles an hour."

Section 1450, Code of 1906 (Section 1268, Hemingway's 1927 Code,) provides that, "Every person making an arrest shall take the offender before the proper officer without unnecessary delay for examination of his case".

SECTION 153. (1) EXCEPT AS STATED IN SUBSECTION (2), THE ARREST OF ANOTHER IS NOT PRIVILEGED UNLESS THE ACTOR MANIFESTS TO THE OTHER,

(a) His intention to arrest the other, and

(b) (i) If the arrest be without a warrant, the offense or conduct for which the arrest is made. (ii) If the arrest be under warrant, his possession of the warrant and the offense or conduct charged therein.

(2) NONE OF THE MANIFESTATIONS STATED IN SUBSECTION (1) ARE REQUIRED, IF THE MAKING THEREOF IS REASONABLY BELIEVED BY THE ACTOR TO BE:

(a) Dangerous to the actor or third person, or

(b) Likely to imperil the making of the arrest, or

(c) Useless or unnecessary.

COMMENT to Subsection (1):

"It is not necessary that the actor use any particular form of words in

making any of the manifestations required by this section. Any words or conduct are sufficient if they fairly apprise the other of the actor's intention to arrest him, and of the offense or other conduct for which the arrest is sought to be made without a warrant, or of the actor's possession of the warrant and its contents, if the arrest is sought to be made under a warrant.

"The fact that a peace officer making an arrest is to the other's knowledge in uniform or so displays his badge of office as to be reasonably visible to the other, is a sufficient manifestation of his intention to make the arrest."

Section 1204, Code of 1906 (Section 1265, Hemingway's 1927 Code), provides that . . . . . "And in all cases of arrest without warrant, the person making such arrest must inform the accused of the object and cause of the arrest, except when he is in the actual commission of the offense, or is arrested on pursuit."

COMMENT to subsection (2):

"If the actor reasonably believes that the other is incapable of understanding any manifestation, as where the other is intoxicated or insane, or is unfamiliar with the language, it would be absurd to require the actor to make an apparently useless demonstration.

"If the person arrested knows of the cause of his arrest, the manifestation thereof would be a mere superfluous and idle ceremony and is therefore not required. If an officer attempts to arrest or arrests another engaged in the commission of an offense or on fresh pursuit, the officer is not required to manifest the cause of the arrest. In such case it is extremely unlikely that the person arrested is unaware of the fact that he is committing the offense but his ignorance thereof is immaterial unless the actor realizes or should realize that the other is not aware that his conduct constitutes an offense. Where the offense for which the arrest is made is a breach of the peace, such a situation rarely arises, but it may readily arise where the arrest is made under statutory authority for a misdemeanor or a breach of an ordinance.

"If the actor reasonably believes that the other, if warned of the actor's intention to arrest him, will offer resistance which may defeat the arrest or will make a possible successful attempt to flee, the actor is privileged to arrest the other without any of the manifestations which are usually required. So, also, such manifestations are not required if the other's character is known or reasonably believed to be such as to make it likely that he will offer resistance threatening injury to the actor or a third person. Since no manifestation need to be made where it is likely to defeat the arrest or to make it dangerous to the actor, and it being the actor's duty to effect the arrest with the least possible force, the actor is privileged to manifest a false cause for arrest if by so doing he reasonably believes that he can prevent flight or resistance which is likely to be successful or dangerous. Thus, if the actor is privileged to arrest another of desperate character for a serious crime and he reasonably believes that the other or his friends will offer effective or dangerous resistance to the arrest for such a crime, he is privileged to state that he is arresting the other for some lesser offense, if by so doing there is reasonable chance of preventing such resistance."

ILLUSTRATION:

"(c) *A*, a policeman, reasonably suspects *B*, a man of desperate character, of having murdered *C*. *A* sees *B* driving an automobile, containing several

other persons of similar character. Irrespective of whether *B* is or is not driving in violation of a traffic act or ordinance, *A* is privileged to arrest *B*, stating that the arrest is for the violation of such an act or ordinance, although upon taking *B* to the station, *A* causes *B* to be booked for murder.

"If the actor is excused, under the principles stated in this subsection, from making, at the time of the arrest, any of the manifestations required by subsection (1), he must make them at the first practicable moment thereafter."

Subsection (2) (a). Accord. *Tolbert vs. State*, 71 Miss. 179.

SECTION 154. SUBJECT TO THE CONDITIONS STATED IN THIS CHAPTER, THE ACTOR IS PRIVILEGED TO AREST ANOTHER AT ANY PLACE; EXCEPT THAT:

(a) If the arrest is made under a warrant, it is not privileged unless it is made within the territory within which the court, body or official issuing the warrant has authority to order the arrest; or

(b) If the arrest, not being a recapture, is made upon civil process, it is not privileged if it is made in the dwelling place of the other into which the actor has entered by breaking.

COMMENT: "One of the conditions peculiarly applicable to this section is the principle stated in Section 148, that the privileges peculiar to a peace officer as such cannot exceed the area over which the court or other body appointing or designating him has jurisdiction.

"The question whether certain buildings or locations, such as ambassadorial residences, post offices and military reservations, are within the territorial limits of a state, is not within the scope of the restatement of this subject.

ILLUSTRATION:

"(a) A statute gives a peace officer authority to arrest a person guilty of breach of a municipal ordinance. *A* is appointed a peace officer within the City of X. *B* is guilty of a breach of the municipal ordinance of the City of Y. *A* is not privileged to arrest *B*."

COMMENT to clause (a):

"This clause applies only to a case in which an arrest is made by virtue of a warrant. As stated in Comment to Section 146, Clauses (a) and (b), an arrest may be made without a warrant in one state for a felony committed in another state.

COMMENT to clause (b):

"The term 'dwelling place' as used in this section, is defined in the Comment to Section 84 (d, i) (Restatement No. 2). The word 'breaking' as used in this chapter is defined in the Comment to Section 110.

"As stated in Section 160 (2), the actor is privileged to recapture another whom he had previously arrested under civil process, although to do so he has been obliged to break into the dwelling place of the other.

Section 1446, Code of 1906, (Section 1264, Hemingway's 1927 Code), provides that, "Arrests for criminal offenses, and to prevent a breach of the peace, or the commission of a crime, may be made at any time or place".

Section 1448, Code of 1906 (Section 1266, Hemingway's 1927 Code), provides that, "To make an arrest, an officer or private person, after notice of his office and object, if admittance is refused, may break open a window or outer or inner door of any dwelling or house in which he has reason to believe the offender may be found".

In *Monett vs. Toney*, 119 Miss. 853, 81 So. 593, it was said that, "An officer, in seeking to arrest one charged with crime, whose arrest he is legally authorized to make, may enter and search the dwelling house of the accused, or the dwelling house of any other person, when acting in good faith, upon reasonable belief that the accused is in the house.

An officer having probable cause to believe that a felony is being committed in a house may break open a door thereof and enter the house for the purpose of arresting the person committing the felony, though having no warrant therefor. *Love vs. State*, 142 Miss. 602, 107 So. 667.

Whether the facts on which the officer acted were sufficient to constitute probable cause is a judicial question. *Mopp vs. State*, 148 Miss. 739, 114 So. 825.

SECTION 156. SUBJECT TO THE CONDITIONS OF THIS CHAPTER, THE USE OF FORCE AGAINST ANOTHER FOR THE PURPOSE OF EFFECTING THE ARREST OF THE OTHER BY A MEANS INTENDED OR LIKELY TO CAUSE DEATH:

(a) Is privileged if, (i) The arrest is made for treason or for any of those felonies which normally cause or threaten death or serious bodily injury or which involve the breaking and entering of a dwelling place or other building used for the purpose of keeping property of substanial value, and (ii) The actor reasonably believes that the arrest cannot otherwise be effected.

(b) Is not privileged if the arrest is made under civil process or for a breach of the peace or other misdemeanor, or for a felony less grave than those described in subclause (a, i).

COMMENT: "In determining whether the particular means used to effect an arrest are privileged under the principles stated in this section, the fact that they are or are not intended to cause death, or are or not such that the actor, as a reasonable man, should realize that they are likely to cause such a result, is decisive; the harm which results from their use is immaterial. Thus, if the actor uses a deadly weapon to effect another's arrest for a mere breach of the peace, he is liable for any injury, however trivial, which he inflicts upon the other. On the other hand, if the actor in making an arrest for a breach of the peace is compelled to seize the other's arm, he is not liable if he unwittingly reopens a wound and so causes the other to bleed to death. Compare Comment to Section 84 (Restatement No. 2).

"A confinement imposed to effect an arrest is rarely such as to threaten death. If, however, a confinement is intended or likely to so result, the existence of a privilege to impose it is determined by the principles stated in this section.

"This section states the principles which determine the existence of a privilege to use force intended or likely to cause death for the purpose of effecting any arrest which is privileged under the principles stated in any of the sections of this chapter. It applies as fully to an arrest made without a warrant by a private person or a peace officer (see Section 146, 147, 148) as to an arrest made under a warrant (See Section 149).

"This section states only the conditions under which the use of force intended or likely to cause death is privileged if used solely for the purpose of effecting another's arrest. If the actor, being privileged to arrest another,

attempts to do so and the other resists the arrest by using deadly force, the actor is privileged to use similar force in self defence under the conditions stated in Section 84 (Restatement No. 2) irrespective of whether the offense for which he is attempting to arrest the other is such, under the principles stated in this Section, would or would not make the use of such force privileged if used for the sole purpose of effecting the arrest. In such case, the actor is not required, before using such force in self defense, to desist from his efforts to effect the other's arrest, although the other's threat to use deadly force is conditioned upon the actor's persistence in his efforts, and he, therefore, knows that he can with perfect safety avoid the necessity of using deadly force by abandoning them. See Section 84 (d, iii) Restatement No. 2).

"Force intended or likely to cause death may be used to effect an arrest either by preventing the other from avoiding it by flight or by overcoming or preventing the other's resistance to it. Such force may be threatened for the purpose of overawing the other and so preventing him from fleeing or resisting. It is immaterial whether the force is used or threatened to prevent flight or to overcome or prevent resistance. The use or threat of force intended or likely to cause death for any of these purposes is privileged, if the arrest sought to be effected thereby is for treason or for a felony, such as is described in Subsection (1); it is not privileged, unless the arrest is for such a felony or for a felony, which, while not falling within the exact terms of Subsection (1), is of substantially as grave a character as those described therein.

ILLUSTRATION:

"*A* has a warrant directing him to arrest *B* for larceny. *B*, seeing *A* approaching for the manifest purpose of serving the warrant, jumps into his automobile and starts to drive away. *A* is not privileged to shoot *B* in order to prevent him from escaping."

Section 1230, Code of 1906 (Section 1009, Hemingway's 1927 Code), provides that, "The killing of a human being . . . . . shall be justifiable . . . . . when necessarily committed by public officers, or those acting by their command in their aid, and assisting in the arrest of any felon fleeing from justice."

In *Jackson vs. State,* 66 Miss. 89, 5 So. 690, 14 Am. State Rep. 542, where a person charged with grand larceny was killed by an officer when attempting to arrest him, the court said that this statute "is merely declaratory of the common law".

The statute was applied in *Pickett vs. State,* 139 Miss. 529, 104 So. 358, wherein the person sought to be arrested had in possession a still, and was engaged in the manufacture of intoxicating liquor, both of which are felonies. In *Brown vs. Weaver,* 76 Miss. 7, 23, So. 388, 7 Am. State Rep. 512, 42 L. R. A. 423, a sheriff was held not to be justified in shooting a fleeing misdemeanor in order to arrest him or to prevent his escape.

SECTION 160. (1) EXCEPT AS STATED IN SUBSECTION (2), THE USE OF FORCE AGAINST ANOTHER FOR THE PURPOSE OF EFFECTING THE RE-CAPTURE OF THE OTHER, WHO, HAVING BEEN LAWFULLY ARRESTED, HAS ESCAPED OR BEEN RESCUED, IS PRIVILEGED UNDER THE SAME CONDITIONS AS CREATE THE PRIVILEGE TO USE FORCE FOR THE PURPOSE OF EFFECTING HIS ARREST.

COMMENT: "The actor is not privileged to use, for the purpose of effecting the re-capture of another who has escaped or been rescued from a

custody taken under a privileged arrest, any means which are in excess of those necessary to effect the re-capture, see Section 157. Nor is he privileged to use for such purpose any force intended or likely to cause death or serious bodily injury, unless the other has escaped or been rescued from an arrest for a felony of the character described in Section 156 (a).

"The privilege to recapture one who has been lawfully arrested exists, not only in the person who made the arrest, but in any other person, if the re-capture is made upon fresh pursuit, in which case the one so arresting has the same privilege as the person who originally made the arrest. Thus, if a person who has been arrested upon a warrant, in either a criminal or civil proceeding, escapes, a bystander may pursue and re-capture him.

"Where the actor has arrested another upon a warrant, either in a criminal or civil proceeding, and the other escapes from arrest, the actor is privileged to recapture him at a subsequent time, although the actor does not have the warrant with him, if the warrant is still outstanding.

Accord. *Tolbert vs. State*, 71 Miss. 179, 14 So. 462.

Section 1230, Code of 1906 (Section 1009, Hemingway's 1927 Code), provides that, "killing of a human being . . . . shall be justifiable . . . . . when necessarily committed by public officers, or those acting by their command in their aid and assistance, in re-taking any felon who has been rescued or has escaped".

Section 1449, Code of 1906 (Section 1267, Hemingway's 1927 Code), provides that, if an offender escape or be rescued, the person from whose possession or custody he escaped or was rescued, may immediately pursue and retake him at any time and in any county, without a warrant.

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Bryan, H. M., Jackson, Miss.
Burgin, D. A., Jackson, Miss.
Burkett, J. G., Jackson, Miss.
Butler, Geo., Jackson, Miss.
Snow, Chas. B., Jackson, Miss.
Campbell, Chas. S., Jackson, Miss.
Chambers, Paul C., Jackson, Miss.
Trenholm, Edward L., Jackson, Miss.
Cooper, P. G., Jackson, Miss.
Cox, Wm. H., Jackson, Miss.
Creekmore, Rufus H., Jackson, Miss.
Crisler, Chas. W., Jackson, Miss.
Davis, W. H., Jackson, Miss.
Denny, W. M. Jr., Jackson, Miss.
Dorroh, C. E., Jackson, Miss.
Eager, P. H. Jr., Jackson, Miss.
Easterling, Lamar F., Jackson, Miss.
Enochs, De Wit C., Jackson, Miss.
Ethridge, Geo. H., Jackson, Miss.
Flowers, J. N., Jackson, Miss.
Brown, Jas. T., Jackson, Miss.
Hester, C. L., Jackson, Miss.
Floyd, Earle N., Jackson, Miss.
Fox, Jno. H. Jr., Jackson, Miss.
Fulgham, H. McK., Jackson, Miss.
Green, J. W., Jackson, Miss.
Green, Marcellus, Jackson, Miss.
Green, Garner Wynn, Jackson, Miss.
Potter, Chalmers P., Jackson, Miss.
Gulledge, W. A., Jackson, Miss.
Hamilton, Geo. H., Jackson, Miss.
Todd, E. B., Jackson, Miss.
Hardy, R. R., Jackson, Miss.
Hendrick, Leon F., Jackson, Miss.
Hendrix, Thos. D., Jackson, Miss.
Burkett, John G., Jackson, Miss.
Hester, C. L., Jackson, Miss.
Hilton, R. T., Jackson, Miss.
Hilton, W. D., Jackson, Miss.
Hindman, E. E., Jackson, Miss.
Holden, H. Cassedy, Jackson, Miss.
Horton, W. T., Jackson, Miss.
Howie, J. H., Jackson, Miss.
Howie, Virgil, Jackson, Miss.

Howorth, Jos. M., Jackson, Miss.
Huey, R. M., Jackson, Miss.
Hughes, W. H., Jackson, Miss.
Nobles, G. R., Jackson, Miss.
Lane, E. M., Jackson, Miss.
Inman, C. E., Jackson, Miss.
Jaap, C. O., Jackson, Miss.
Jones, L. B., Jackson, Miss.
Knox, R. H., Jackson, Miss.
Latham, S. A., Jackson, Miss.
Lauderdale, J. A., Jackson, Miss.
Leach, H. B., Jackson, Miss.
Longino, A. H., Jackson, Miss.
Lotterhos, F. H., Jackson, Miss.
Lotterhos, F. J., Jackson, Miss.
Lyell, Garland, G., Jackson, Miss.
May, L. P., Jackson, Miss.
May, Geo. W., Jackson, Miss.
Sanders, J. O. S., Jackson, Miss.
McLaurin, A. J., Jackson, Miss.
Mayes, L. L., Jackson, Miss.
Mayes, F. L., Jackson, Miss.
McClendon, B. B., Jackson, Miss.
McGowen, Hardy R., Jackson, Miss.
McLaurin, A. J. Jr., Jackson, Miss.
McNeil, M. S., Jackson, Miss.
Hendrick, L. F., Jackson, Miss.
Moore, Thos., Jackson, Miss.
Morse, W. E., Jackson, Miss.
Bryan, H. M., Jackson, Miss.
Moseley, Niles, Jackson, Miss.
Nobles, G. R., Jackson, Miss.
Patrick, E. W., Jackson, Miss.
Penix, Jos. Hudson, Jackson, Miss.
Peyton, F. L. Jr., Jackson, Miss.
Phifer, R. S. Jr., Jackson, Miss.
Pilgrim, M. A., Jackson, Miss.
Posey, L. L., Jackson, Miss.
Potter, Judge W. H., Jackson, Miss.
Powell, Robt., Jackson, Miss.
Harper, A. Y., Jackson, Miss.
Jiggitts, Louis M., Jackson, Miss.
Power, George B., Jackson, Miss.
Rhodes, John Sivley, Jackson, Miss.
Ricketts, Robert B., Jackson, Miss.
Ridgway, Chas R. Jr., Jackson, Miss.
Robertson, Stokes V., Jackson, Miss.
Campbell, Chas. S., Jackson, Miss.
Scott, W. A. Jr., Jackson, Miss.
Scott, Frank T., Jackson, Miss.
Scott, Charlie, Jackson, Miss.
Horton, W. T., Jackson, Miss.
Shaw, Geo. E., Jackson, Miss.
Smith, Sidney, Jackson, Miss.
Snow, Chas. B., Jackson, Miss.
Snowden, Grady W., Jackson, Miss.
Stevens, J. M., Jackson, Miss.
Stricker, V. J., Jackson, Miss.
Sykes, E. O., Jackson, Miss.
Teat, G. L., Jackson, Miss.
Teat, Has. A., Jackson, Miss.
Thompson, J., Jackson, Miss.
Thompson, R. H., Jackson, Miss.
Thompson, J. H., Jackson, Miss.
Travis, Cecil F., Jackson, Miss.
Watkins, W. H., Jackson, Miss.
Watkins, H. W., Jackson, Miss.
Wells, W. C., Jackson, Miss.
Wells, W. Calvin, Jackson, Miss.
Whitfield, Garland Q., Jackson, Miss.
Mobley, R. T., Jackson, Miss.
Howorth, Mrs. Jos. M., Jackson, Miss.
Nunnery, Herbert, Jackson, Miss.
Creekmore, H. H., Jackson, Miss.
Creekmore, Wade, Jackson, Miss.
Horan, Jackson, Miss.
Stennett, Jackson, Miss.
ONeil, A. M., Jackson, Miss.
Cassedy, James, Jr., Jackson, Miss.
Von Blomberg, A. J., Jackson, Miss.
Avery, Ralph, Jackson, Miss.
Fontaine, W., Jackson, Miss.
Forman, J. M., Jackson, Miss.
Lipscomb, Hubert, Jackson, Miss.
Cochran, Louis, Jackson, Miss.
Calhoun, L. J., Jackson, Miss.
Travis, Cecil, Jackson, Miss.
Jones, P. X., Jackson, Miss.
Crisler, Bert, Jackson, Miss.
Nichols, B., Jackson, Miss.
Thompson, R. H. Jr., Jackson, Miss.
McGowan, M. M., Jackson, Miss.
Barnett, Ross R., Jackson, Miss.
Gillespie, H. B., (County Attorney), Raymond, Miss.
Ratliff, P. D., Raymond, Miss.
Williams, M. Ney, Raymond, Miss.

HOLMES COUNTY

Boothe, J. B., Lexington, Miss.
Fuqua, J. H., Lexington, Miss.
Gulledge, R. W., Lexington, Miss.
Lindholm, P. P., Lexington, Miss.
McMorrough, G. H., Lexington, Miss.
Neilson, E. T., Lexington, Miss.
Johnson, H. H., Lexington, Miss.
Pepper, A. M., Lexington, Miss.
Ruff, A. M., Lexington, Miss.
Williams, P. H., Lexington, Miss.
Boyett, W. G., Durant, Miss.
Drake, Carl, Durant, Miss.

HUMPHREYS COUNTY

Blackwell, M. G., Belzoni, Miss.
Jones, H. F., Belzoni, Miss.
Montgomery, V. B., Belzoni, Miss.
Mortimer, T. E., Belzoni, Miss.
Murphy, C. M., Belzoni, Miss.
Nason, R. H., Belzoni, Miss.
Reed, Dudley, Belzoni, Miss.
Sumrall, N. W., Belzoni, Miss.
Womack, W. D., Belzoni, Miss.

ISSAQUENA COUNTY

Scudder, E. N., Mayersville, Miss.

ITTAWAMBA COUNTY

Brown, D. W., Fulton, Miss.
Brown, James M., Fulton, Miss.
Brown, J. H., Fulton, Miss.
Cleveland, Arthur T., Fulton, Miss.
Sheffield, Isaac L., Fulton, Miss.
Spearman, P. D. P., Fulton, Miss.

JACKSON COUNTY

McInnis, F. S., Moss Point, Miss.
Wood, C. H., Moss Point, Miss.
Babendreer, Elinor, Ocean Springs, Miss.
Clark, C. E., Ocean Springs, Miss.
Bloomfield, H., Pascagoula, Miss.
Bullard & Bullard, R. L., W. D., Pascagoula, Miss.
Chidsey, C. E., Pascagoula, Miss.
Colmer & Herring, Pascagoula, Miss.
Everitt, H. B., Pascagoula, Miss.
Ford, White, Graham & Gautier, Pascagoula, Miss.
Heidelberg, H. P., Pascagoula, Miss.
Meriwether, C. S., Pascagoula, Miss.

JASPER COUNTY

Whitman, Sam, Bay Springs, Miss.
Brown, G. N., Bay Springs, Miss.
Thompson, J. L., Bay Springs, Miss.
Oates, O. M., Bay Springs, Miss.
McFarland, J. A., Bay Springs, Miss.
Travis, J. M., Heidelberg office half time, Residence, Meridian, Miss.

JEFFERSON COUNTY

Corban, R. L., Fayette, Miss.
Corban, R. L. Jr., Fayette, Miss.
Easterling, W. R., Fayette, Miss.
Torrey, J. E., Fayette, Miss.
Truly & Truly, Fayette, Miss.
Jeff, E. G., Fayette, Miss.

JEFFERSON DAVIS COUNTY

Livingston, W. H., Prentiss, Miss.
Millroy, G. M., Prentiss, Miss.
Thompson, C. E., Prentiss, Miss.
Luper, O. C., Prentiss, Miss.
Stringer, H. C., Oakville, Miss.

JONES COUNTY

Buchanon, J. R., Laurel, Miss.
Boutwell, B. A., Laurel, Miss.
Bush, F. H., Laurel, Miss.
Boyd, M. W., Laurel, Miss.
Collins, Jeff, Laurel, Miss.
Cooper, Ellis B., Laurel, Miss.
Collins, F. O., Laurel, Miss.
Collins, F. B., Laurel, Miss.
Carter, B. F., Laurel, Miss.
Cooley, D. B., Laurel, Miss.
Deavours, Stone, Laurel, Miss.
Deavours, Jack, Laurel, Miss.
Evans, C. C., Laurel, Miss.
Ferris, E. B., Laurel, Miss.
Hilbun, Henry, Laurel, Miss.
Hosey, G. W., Laurel, Miss.
Finch, Henry, Laurel, Miss.
Montgomery, Goode, Laurel, Miss.
Melvin, L. B., Laurel, Miss.
Noble, Roy P., Laurel, Miss.
Pack, W. J., Laurel, Miss.
Pack, W. L. Jr., Laurel. Miss.
Ross, H. E. J., Laurel, Miss.
Street, C. S., Laurel, Miss.
Shannon, C. R., Laurel, Miss.
Schauber, A. B., Laurel, Miss.
Scott, A. S., Laurel, Miss.
Taylor, J. T., Ellisville, Miss.
Welch, W. S., Laurel, Miss.
Welch, James T., Laurel, Miss.

KEMPER COUNTY

Clark, J. A., DeKalb, Miss.
Davis, D. P., DeKalb, Miss.
Daws, J. H., DeKalb, Miss.
Spinks & Press, DeKalb, Miss.

LAFAYETTE COUNTY

Stone, Jas. Sr., Oxford, Miss.
Stone, Phil, Oxford, Miss.
Falkner, J. W. T., Oxford, Miss.
Andrews, L. C., Oxford, Miss.
McElroy, T. H., Oxford, Miss.
Oldham, L. E., Oxford, Miss.
Farley, R. J., Oxford, Miss.
Hutton, L. C., Oxford, Miss.
Kimbrough, T. C., Dean of University Law School, Oxford, Miss.
Roberds, W. G., Professor of Law, Oxford, Miss.
Hemingway, Wm. G., Professor of Law, Oxford, Miss.

LAMAR COUNTY

Broadus, A. Q., Purvis, Miss.
Coleman, E. F., Purvis, Miss.
Cooper, J. E., Purvis, Miss.
Davis, Wallace & Yeager, Purvis, Miss.
Garraway, J. T., Purvis, Miss.
Hatten, W. J., Sumrall, Miss.
Scarborough, C. P., Sumrall, Miss.
Shanks, J. W., Sumrall, Miss.

LAUDERDALE COUNTY

Amis, Dunn & Snow, Meridian, Miss.

Bailey, T. L., Meridian, Miss.
Baskin, Wilbourn & Miller, Meridian, Miss.
Bourbeaux, R. M., Meridian, Miss.
Bosman & Cammeron, Meridian, Miss.
Bradley, W. N., Meridian, Miss.
Brahan, F. V., Meridian, Miss.
Brook, A., Meridian, Miss.
Byrd & Broach, Meridian, Miss.
Cammeron, C. B., Meridian, Miss.
Cochran, R. F., Meridian, Miss.
Cooper, R. D., Meridian, Miss.
Curry & Amis, Meridian, Miss.
Dabney, J. M., Meridian, Miss.
Duncan B. A., Meridian, Miss.
Dunn, A. C., Meridian, Miss.
Dunn, J. L., Meridian, Miss.
Easterling, W., Meridian, Miss.
Ethridge, F. K., Meridian, Miss.
Floyd, J. C., Meridian, Miss.
Gilbert, V. W., Meridian, Miss.
Gilespie, R. G., Meridian. Miss.
Gipson, J. V., Meridian, Miss.
Graham, S. M., Meridian, Miss.
Holmes, D. B. Jr., Meridian, Miss.
Jacabson & Brooks, Gabe, J., Meridian, Miss.
Johnson, C. C., Meridian, Miss.
Mahon, H. K. Jr., Meridian, Miss.
McBeath, J. M., Meridian, Miss.
Miller, M. V. B., Meridian, Miss.
Neville, G. B., Meridian, Miss.
Phillips, Casper C., Meridian, Miss.
Riely & Parker, Marian, W. R., Meridian, Miss.
Sams, W. C., Meridian, Miss.
Shotts, H. A., Meridian, Miss.
Stone, H. R., Meridian, Miss.
Temple, W. F., Meridian, Miss.
Walker, Wallace, Meridian, Miss.
Williamson & Clayton, Meridian, Miss.
Williamson, Wald & Jerome, R., Meridian, Miss.
Witherspoon, Gibson, Meridian, Miss.
Witherspoon, S. A., Meridian, Miss.
Wright, C. M., Meridian, Miss.

LAWRENCE COUNTY

Arrington, J. H., Monticello, Miss.
Gibson, C. E., Monticello, Miss.
Lee, W. J. Jr., Monticello, Miss.
McGee, G. W., Monticello, Miss.
Patterson, E. D., Monticello, Miss.

LEAKE COUNTY

Barnett, H. C., Carthage, Miss.
Barnett, T. J., Carthage, Miss.
Ellis, W. A., Carthage, Miss.
McMillin & Leach, Carthage, Miss.
Scott, J. M., Carthage, Miss.
Triplett, W. T., Carthage, Miss.
Walker, R. B., Carthage, Miss.
Weir, W. T., Carthage, Miss.
Warwick, A. M., Carthage, Miss.
Golden, H. C., Madden, Miss.

LEE COUNTY

Cochran, A. B., Baldwyn, Miss.
Cox & Cox, Baldwyn, Miss.
Anderson, J. R., Tupelo, Miss.
Anderson, W. D., Tupelo, Miss.
Blaire, W. A., Tupelo, Miss.
Boggan & Leake, Tupelo, Miss.
Bolton & Monaghan, Tupelo, Miss.
Hill, G. H., Tupelo, Miss.
Long, C. P., Tupelo, Miss.
Long, S. P., Tupelo, Miss.
Long, S. H., Tupelo, Miss.
Mitchell & Clayton, Guy, W. M., Tupelo, Miss.
Mitchell & Draper, Geo., T. M., Tupelo, Miss.
Rankin & Finley, Tupelo, Miss.
Thomas, J. M., Tupelo, Miss.
Thomas, Frank, Tupelo, Miss.

LEFLORE COUNTY

Bell, A. H. Greenwood, Miss.
Brown, D. T., Greenwood, Miss.
Colson & Guy, Greenwood, Miss.
Ford, R. C., Greenwood, Miss.
Gardner, Odom & Gardner, Greenwood, Miss.
Gwin, S. L., Greenwood, Miss.
Hughston, E. V., Greenwood, Miss.
Johnston, Means, Greenwood, Miss.
Jordan, R. A., Greenwood, Miss.
Kimbrough, Tyson & Kimbrough, Greenwood, Miss.
Lamb, Knox, Greenwood, Miss.
McBee, R. C., Greenwood, Miss.
Montjoy, Paul, Greenwood, Miss.
Mounger, H. C., Greenwood, Miss.
Osborn & Witty, Greenwood, Miss.
Petty, R. J., Greenwood, Miss.
Pierce, M. F., Greenwood, Miss.
Pollard & Hamner, Greenwood, Miss.
Rosethal, Simon, Greenwood, Miss.
Stoner, Alfred, Greenwood, Miss.
Whittington, W. M., Greenwood, Miss.
Wright, D. S., Greenwood, Miss.
Yerger, L. P., Greenwood, Miss.
Morgan, F. R., Morgan City, Miss.

LINCOLN COUNTY

Arrington, R. O., Brookhaven, Miss.
Boothe, W. E., Brookhaven, Miss.
Brady, Dean & Hobbs, Brookhaven, Miss.
Brennan, E. F. Jr., Brookhaven, Miss.
Cassidy, J. W., Brookhaven, Miss.

Cohn, A. A., Brookhaven, Miss.
Dodds, G. S., Brookhaven, Miss.
Harris, E. D., Brookhaven, Miss.
Jones, P. Z., Brookhaven, Miss.
Naul & Yawn, Brookhaven, Miss.
Noble, J. F., Brookhaven, Miss.
Wall, Hugh V., Brookhaven, Miss.

LOWNDES COUNTY

Baldwin, Wm., Columbus, Miss.
Downs, A. B., Columbus, Miss.
Frierson & Weaver, Columbus, Miss.
Harrison, J. T., Columbus, Miss.
Lewis, T. W., Columbus, Miss.
Lincoln & Lincoln, Columbus, Miss.
Loving & Loving, Columbus, Miss.
Mathews, B., Columbus, Miss.
Owen & Garnett, Columbus, Miss.
Rencher, G. J., Columbus, Miss.
Sims, W. L., Columbus, Miss.
Stribling, W. P., Columbus, Miss.
Sturdivant, J. I., Columbus, Miss.

MADISON COUNTY

Dunning, T. S., Canton, Miss.
Foot, A. K. Canton, Miss.
Greaves, H. B., Canton, Miss.
Harrell, E. B., Canton, Miss.
Huber, H. T., Canton, Miss.
Howell, R. S., Canton, Miss.
Powell, W. H. & Powell, Robt. H., Canton, Miss.
Ray & Spivey, Canton, Miss.
Shackleford, R. H., Canton, Miss.
Spivey, R. E., Canton, Miss.
Ward, T. S., Canton, Miss.
White, & McCool, Canton, Miss.
Floyd, C. N., Flora, Miss.

MARION COUNTY

Dale, R. H., Columbia, Miss.
Dale, Sebe, Columbia, Miss.
Davis & Conner, Columbia, Miss.
Ford, R. D., Columbia, Miss.
Goss, B. J., Columbia, Miss.
Hall & Hall, Toxey, Lee D., Columbia, Miss.
Hammond, K. J., Columbia, Miss.
Langston, J. Q., Columbia, Miss.
Mounger & Mounger, Columbia, Miss.
Rawls & Hathorn, Columbia, Miss.
Sylverstein, B. S., Columbia, Miss.

MARSHALL COUNTY

Belk, F. M., Holly Springs, Miss.
Belk, W. D., Holly Springs, Miss.
Doxey, Hindman, Holly Springs, Miss.
Doxey, Wall, Holly Springs, Miss.
Fant, L. G., Holly Springs, Miss.
Featherstone, D. M., Holly Springs, Miss.
Mahon, H. K. Sr., Holly Springs, Miss.
Smith, L. A., Sr., Holly Springs, Miss.
Smith, L. A. Jr., Holly Springs, Miss.
Smith, E. M., Holly Springs, Miss.
Vick, John, Redbanks, Miss.
Wright, E. C., Holly Springs, Miss.

MONROE COUNTY

Buchanan, Frank, Amory, Miss.
Prude, J. O. Jr., Amory, Miss.
Streetman, D. H., Amory, Miss.
Tubb, Chas. L., Amory, Miss.
Tubb, Talmage B., Amory, Miss.
Houston, D. W. Jr., Aberdeen, Miss.
Houston, D. W. Sr., Aberdeen, Miss.
Leftwich, George J., Aberdeen, Miss.
Leftwich, Frank, Aberdeen, Miss.
Holmes, Maynard, Aberdeen, Miss.
McFarland, Ben H., Aberdeen, Miss.
Paine, Thos. Fite, Aberdeen, Miss.
Paine, George C., Aberdeen, Miss.
Sykes, C. S., Aberdeen, Miss.
Tubb, Condie L., Aberdeen, Miss.
Young, M. C., Aberdeen, Miss.
Holley, E. E., Aberdeen, Miss.

MONTGOMERY COUNTY

Conger, J. W., Winona, Miss.
Glass, F. M., Winona, Miss.
Knox, W. T., Winona, Miss.
McLean & Rowe, Winona, Miss.
Ritchey S., Winona, Miss.

NESHOBA COUNTY

Barrier, R. F., Philadelphia, Miss.
Dees, Paul, Philadelphia, Miss.
Gillis, J. K., Philadelphia, Miss.
Gipson, J. R., Philadelphia, Miss.
Hillman, J. B., Philadelphia, Miss.
McCraw, A. B., Philadelphia, Miss.
Richardson, E. S., Philadelphia, Miss.
Sandford, W. H. Jr., Philadelphia, Miss.
Stribling, Dees, Philadelphia, Miss.
Wilson, G. E., Philadelphia, Miss.

NEWTON COUNTY

Anderson, D. M., Newton, Miss.
Banks, G. H., Newton, Miss.
Carr, J. D., Newton, Miss.
James, W. W., Newton, Miss.
Majure, R. S., Newton, Miss.
Munn, W. I., Newton, Miss.
Rowzee, J. R., Newton, Miss.
Wall, E. R., Newton, Miss.
Day, R. H., Decatur, Miss.

Foy, M. T., Decatur, Miss.
Bayless, H. L., Union, Miss.
Johnson, C. E., Union, Miss.
Stamper, G. W., Union, Miss.
Hunter, J. Q., Union, Miss.
Everett, W. M., Hickory, Miss.
Blackburn, D., Conehatta, Miss.

NOXUBEE COUNTY

Allgood, D. F., Macon, Miss.
Brame, P. W., Macon, Miss.
Britton, E. H., Macon, Miss.
Bush & Strong, Macon, Miss.
Dent & Lucas, Macon, Miss.
Dorroh, Iva L., Macon, Miss.
Martin, L. L., Macon, Miss.
Minor, H. A., Macon, Miss.
Richardson, Chas., Macon, Miss.
Tyson, J. A., Macon, Miss.

OKTIBBEHA COUNTY

Bell, B. F., Starkville, Miss.
Daniel, G. O., Starkville, Miss.
Green, J. D., Starkville, Miss.
McGruder, W. W. Starkville, Miss.
Rice, J. S., Starkville, Miss.
Walker, B. M. Jr., Starkville, Miss.
Ward, W. E., Starkville, Miss.
Butts, A. B., A. & M. College, Miss.

PANOLA COUNTY

Fant, Herbert, Sardis, Miss.
Keys, Taylor, Sardis, Miss.
Kyle, John W., Sardis, Miss.
McClure, James, Sardis, Miss.
Boyles, J. B., Batesville, Miss.
Johnson, D. R., Batesville, Miss.
Perkins, Howard, Batesville, Miss.

PEARL RIVER COUNTY

Alexander, M. L., Picayune, Miss.
Keaton, Grayson, Picayune, Miss.
Stockstill, J. E., Picayune, Miss.
Tyler, L. L., Picayune, Miss.
Weaver, T. J., Picayune, Miss.
Hathorn, F. C., Poplarville, Miss.
Locke, Leopold, Poplarville, Miss.
Mayfield, J. B., Poplarville, Miss.
Morse, J. M. Jr., Poplarville, Miss.
Street, J. C., Poplarville, Miss.
Shivers, J. C., Poplarville, Miss.
Williams, E. D., Poplarville, Miss.

PERRY COUNTY

Watkins, A. T. L., New Augusta, Miss.
Young, H. D., New Augusta, Miss.
Burdette, W. F., Richton, Miss.
Fishel, E. C., Richton, Miss.
Shoemaker, A. R., Richton, Miss.
Smith, C. C., Richton, Miss.

PIKE COUNTY

Hutchinson, J. T., Summitt, Miss.
Parson, W. A., Summitt, Miss.
Cassidy, J. J., McComb, Miss.
Cutrer, L. W., McComb, Miss.
Davis, J. E., McComb, Miss.
Hewitt, F. D., McComb, Miss.
Hunt, Mrs. Nellie, McComb, Miss.
Jackson, W. F., McComb, Miss.
Jackson, F. V., McComb, Miss.
McGuire, J. S., McComb, Miss.
McGehee, L. H., McComb, Miss.
Mixon, W. B., McComb, Miss.
McLain, W. G., McComb, Miss.
Price, K. G., McComb, Miss.
Reeves, R. B., McComb, Miss.
Price, J. H. Sr., Magnolia, Miss.
Price, J. H. Jr., Magnolia, Miss.
Mitchell, Thos., Magnolia, Miss.
Wiltshire, J. A., Magnolia, Miss.
Cutrer, Judge R. W., Magnolia, Miss.
Simmons, Judge E. J., Magnolia, Miss.

PONTOTOC COUNTY

Adams, Marshall T., Pontotoc, Miss.
Bratton, C. A., Pontotoc, Miss.
Fontaine, J. D., Pontotoc, Miss.
Mauldin, Byrd, Pontotoc, Miss.
Mitchell, A. M., Pontotoc, Miss.

PRENTISS COUNTY

Berry, J., Booneville, Miss.
Cunningham, J. A., Booneville, Miss.
Cunningham, J. E., Booneville, Miss.
Finch, J. S., Booneville, Miss.
Friday, J. E., Booneville, Miss.
Lacey, C. R., Booneville, Miss.
Lacey, Eugene, Booneville, Miss.
Sharp, E. C., Booneville, Miss.
Windham, E. K., Booneville, Miss.

QUITMAN COUNTY

Black, E. C., Marks, Miss.,
Boone, E. E., Marks, Miss.
Boone, R. M. Jr., Marks, Miss.
Cox, W. A., (Insurance and Loans), Marks, Miss.
Denton, M. E., Marks, Miss.
Denton, P. L., (County Attorney), Marks, Miss.
Donaldson, W. M., Marks, Miss.
Gore, W. E., (Member Gore & Gore), Marks, Miss.
Gore, T. N., (Member Gore & Gore), Representative, Marks, Miss.

Gee, W. F., Marks, Miss.
Lamb, L. B., Marks, Miss.
Lowrey, P. H., Marks, Miss.
Lowrey, M. P., Marks, Miss.
Manship, Luther, Marks, Miss.
Pogue, A. A., Marks, Miss.
Stone, J. D., (County Judge), Lambert, Miss.
Stone, Van D., Lambert, Miss.

RANKIN COUNTY

Buchanan, Susie D., Brandon, Miss.
Burns, Robt., Brandon, Miss.
East, J. R., Brandon, Miss.
Henry, P., Brandon, Miss.
McCaskil, H. L., Brandon, Miss.
McIntyre, W. E., Brandon, Miss.
McLaurin, Sidney, L., Brandon, Miss.
Murray, J. C., Brandon, Miss.

SCOTT COUNTY

Cooper, A. W., Forrest, Miss.
Dudley, Colbert, Forrest, Miss.
Eastland, J. O., Forrest, Miss.
Eastland, W. C., Forrest, Miss.
Kent, Jeff, Forrest, Miss.
Lee, Percy M., Forrest, Miss.
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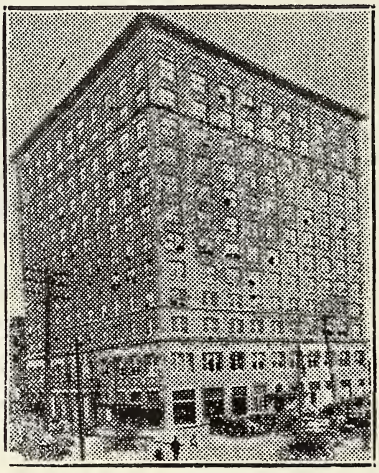

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SOME ASPECTS OF JUDGMENT LIENS

W. A. SCHMITT

It is well settled in Mississippi that an enrolled judgment is a lien on all property,[1] without levy, including personal property, except

(a) Money.[2]

(b) Right to receive or recover a debt.[3]

(c) A voucher for payment of money.[4]

(d) The interest of debtor in deed of trust for his benefit.[5]

(e) Negotiable instruments, Bills of Sale, Assignments.[6]

(f) Choses in Action.[7]

The lien of a judgment takes effect as to after acquired property, not from date of rendition or enrollment, but from date of acquisition by debtor of the property and the lien does not, when property is acquired, relate back to the date of rendition or enrollment.[8] The lien of a judg-

1 Brown v. Clark, 4 How. (U. S.) 4, 11 Law Ed. 850; 3 Rose's Notes 1047.

2 Cahn v. Person, 56 Miss. 360. Among the exceptions may be noted Sections 625 and 3181 Hemingway's Code (Secs. 823, 3970 Code 1906) relating to growing crops.

3 Bryan v. Henderson Hdwe. Co., 107 Miss. 255, 65 So. 242.

4 Walden & Co. v. Yates, 111 Miss. 631; 71 So. 897. The Court held that the creditor had a lien upon the voucher which he could enforce by execution as long as he could find and identify the property. On re-hearing it held that while the voucher was personal property it was not subject to the lien of judgment, presumably until levy. At the end of the opinion Chief Justice Smith said the voucher was seized by the officer after it got out of the possession of the judgment debtor. Judges Sykes and Holden dissented, standing up for a literal construction of Secs. 819, 1591 and 1593 Code of 1906. They incidently said these sections were wrongly construed in Bryan v. Henderson Hdwe. Co.

5 Becket v. Dean, 57 Miss. 232.

6 Walden & Co. v. Yates, supra.

7 Black v. McMurty, Walker Rep. 389. This case was decided before there was any Statute providing for levy on choses. Sec. 3466, Code of 1892 made such provision. Among the reasons advanced for these exceptions by the Courts are the difficulty of identification, the fugitive character of the thing, interference of negotiability, the general absurdity and inconsistency.

8 Moody v. Doe, 25 Miss. 484, Cayce v. Stovall, 50 Miss. 396; Cooper v. Turnage, 52 Miss. 431. The enrollment creates the lien. Johnson v. Cole Mfg. Co., 144 Miss. 482; but a judgment enrolled after the time limited by act (Act of 1844) becomes a lien only from the time of enrollment regardless of

ment in the Circuit Court attaches upon rendition of same; in a Justice of the Peace Court upon enrollment.[9] There are two principal Statutes on judgment liens:

Section 606 (818) of Hemingway's Code of 1917. "Enrollment of Judgments—Judgment Roll. The clerk of the Circuit Court shall procure and keep in his office one or more books, to be styled 'The Judgment Roll', which books shall be appropriately divided under the several letters of the alphabet, and on each page shall be placed the following caption:

Defendant's Name	Amount of Judgment or Decree	Date of Rendition	County and Court in which rendered	Date of Enrollment	Plaintiffs' Names	When & How Satisfied	Remarks

And the clerk shall, within twenty days after the adjournment of each term of the Court, enroll all final judgments rendered at said term, in the order in which they were entered on the minutes, by entering on the judgment roll, under the proper letter or letters of the alphabet, the names of each and every defendant to said judgment, the amount

---

the mistake or omission of the clerk, Planters Bank v. Conger, 12 S. & M., 527.

9 Minshew v. Davidson, 86 Miss. 354; 38 So. 315, citing Sec. 757, Code 1892. See Chapter 131 Laws of 1926, and as amended by Chapter 219 Laws of 1928 creating the County Court. There does not seem to be any specific provision about enrolling judgments and liens.

Also Section 406 Hemingway's Code 1917 as to force, operation and effect of decrees in Chancery Court.

Sec. 285 Hemingway's Code 1917—"The clerk of the Chancery Court shall, within ten days after the expiration of the term at which any decree for money shall be made, which is enforceable by execution against the defendant, furnish an abstract of such decree to the clerk of the Circuit Court of the County in which such decree is made; and it shall be the duty of the Circuit Clerk forthwith to enroll the same on the 'Judgment Roll' in his office as judgments of the Circuit Court are required to be enrolled".

Sec. 610 Hemingway's Code 1917. "No lien in County without Enrollment. Judgments and decrees, at law or in equity, rendered in any Court of the United States held within this State, or in the Supreme Court or the Court of Chancery of this State, shall not be a lien upon or bind the property of the defendant within the County in which such judgments or decrees may be rendered until an abstract thereof shall be filed in the office of the clerk of the Circuit Court of the County and enrolled on the judgment roll, in the manner and on the terms hereinbefore provided; and such judgments and decrees shall bind the property of the defendants from the date of such enrollment, in like manner as judgments and decrees rendered in a different county and so enrolled."

The judgment of a Federal District Court is a lien on property in the State to the same extent as a judgment of a Court of general jurisdiction of the State Court. Secs. 606, 607, 608, 609 and 610 Hemingway's Code 1917 (822, Code 1906) Dobie on Federal Procedure, pars. 164, 195, citing among other cases Re. Jackson L. & T. Co., 265 F (Miss.) 389; Id C. C. A. (Miss.) 289 F 223. See Rhea v. Smith, 71 Law Ed. (U. S.) 839 decided this year, requiring equality and uniformity. U. S. Comp. Stat. (1916) Par. 1606.

of such judgment, the date of its rendition, the county and court in which rendered, the date of enrollment, and the names of the plaintiff or plaintiffs. When any judgment shall be satisfied, the clerk shall so enter under the proper heading, and subscribe the entry."

Section 607 of Hemingway's Code of 1917 is as follows: "607 (819) Lien of Enrolled Judgments. A judgment so enrolled shall be a lien upon and bind all of the property of the defendants within the county where so enrolled, from the rendition thereof; and shall have priority according to the order of such enrollment, in favor of the judgment creditor, his representatives or assigns, against the judgment debtor, and all persons claiming the property under him after the rendition of the judgment; and a judgment shall not be a lien on any property of the defendant thereto unless the same be enrolled; but in counties having two judicial districts a judgment shall operate as a lien only in the district or districts in which it is enrolled."

Sections 1358 and 1360 (1591, 1593) of Hemingway's Code of 1917 of the Chapter of Definitions and Rules are: "1358 (1591) Personal Property. The term 'personal property', when used in any statute, shall include goods, chattels, effects, evidences of rights of action, and all written instruments by which pecuniary obligation, or any right, title or interest in any real or personal estate, shall be created, acknowledged, transferred, incurred, defeated, discharged, or diminished.

1360 (1593) Property. The term 'property' when used in any statute, includes personal property as defined in Section 1277, and also every estate, interest and right, in land, tenements and hereditaments."

By Section 2241 Hemingway's Code, 1917 (Sec. 2742 Code 1906) a judgment rendered by a Justice of the Peace is a lien upon property both real and personal, if an abstract is filed in the office of the clerk of the Circuit Court. The Judgment Lien Statute seems to have appeared for the first time in the Acts of January 23, 1824, an excerpt from Section 12 to be found at page 52 of the Laws of Mississippi of 1824 being:

"* * * and that in all cases the property of the defendant shall be bound, and liable to any judgment that may be entered up, from time of the entering of such judgment."

In the case of *Michie vs. Bank,* 4 How. 130 (1839) it was said: "It is very evident that the lien created by this statute

is in one respect similar to that given by the Act of 1822. It may lose its priority by the act of the creditor himself."[10]

It has been decided that the lien of a judgment is only a security, and confers no jus ad rem.[11] Also that it is not a specific lien on certain property, but only a general lien on all property of the debtor, subject to levy and sale.[12] The judgment lien is not superior to exemptions created by law.[13] But it is stronger and more far reaching than an execution judgment creditor or one who has obtained a lien by execution.[14]

The Alabama Statute (Code Pars. 4156, 4157)[15] creates a lien on "all property of the defendant in the county where filed which is subject to levy and sale under execution", and is not as broad as the Mississippi Statute.

It has been decided that the priority given by the Judgment Lien Statute is lost in favor of a subsequent judgment creditor by such holder agreeing to stay execution upon his judgment and acting in pursuance of such agreement until the lien of an execution under the subsequent judgment attaches.[16] In the case of *Gerlach-Barklow Co. vs. Ellett,* 111 So. 92, the judgment creditor notified the sheriff to release the property from the execution, and later the judgment debtor sold the property to a third party. In a contest between this third party and the judgment creditor the court held that the lien had not been lost or waived; this being distinguishable in principle between the priority rights of respective judgment creditors.

A judgment creditor succeeds to only such rights in the

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10 Page 81, Hutch. Code 1824, Sec. 261 Code 1857; Sec. 830 Code 1871; Sec. 1737 Code 1880; Sec. 757 Code 1892.

11 Michie v. Banks, supra.

12 Simpson v. Smith Sons Gin Co., 75 Miss. 505; 22 So. 805; First National Bank v. Donald, 112 Miss. 681; 73 So. 723; Dozier v. Lewis, 27 Miss. 679. It is neither a jus an re nor a jus ad rem. 4 Kent's Com.

13 First National Bank v. Donald, supra. The right of the widow to one year's allowance was held superior to the lien of judgment.

14 Pearson v. W. R. Moore Co., 110 So. 709.

15 Johnston v. Bates (Ala.) 95 So. 375, where it is also stated that such a lien of judgment is a distinct lien from that commonly referred to as a lien resulting from an execution.

A general canon of construction is that remedial statutes are liberally construed; those in derrogation of the common law to be construed rigidly. Judgment liens are the creatures of the statute but the practice of Mississippi on such liens on personalty without levy of execution is extreme in itself.

16 Michie v. Planters Bank, 1 How. 130; Foute v. Campbell, 7 How. 377; Talbert v. Melton, 9 S. & M. 9; Winchester Simmons v. Phillips, Trustee, 16 F 2nd (C. C. A. 5th Cir.) 109. In considering the negligence, or agreement of judgment creditor in levying execution the Courts have to balance the vice of greed against the virtue of leniency. In Mississippi holding it up two years is too lenient. The clerk is directed to issue execution within twenty days after the adjournment of the term of Court.

judgment debtor's property as the judgment debtor actually has.[17] The object of enrolled judgments is to protect the liens of persons who should become purchasers.[18]

Where several judgments are rendered against defendant on the same day, the judgment which appears first entered on the minutes of the court obtains a priority lien.[19] But in the case of *Crane Bros. & Co. vs. James S. Richardson,* 73 Miss. 254 it was held that where a motion to set aside a judgment for a certain sum is continued from the term at which the judgment is rendered, and at a subsequent term, is overruled, but the judgment is allowed to stand for a less sum, there is, during the interval no final judgment from which an appeal lies; or that can properly be enrolled, and although in fact enrolled on the day after its rendition; the lien thereof is subordinate to that of a subsequent judgment recovered and enrolled during such interval. There seems to be some basis for the opinion that one need not go behind the judgment roll regardless of the mistake or omission of the clerk in enrolling.

If the judgment creditor takes the property subject to all the equities existing against the judgment debtor,[20] it ought to follow that the vendor's lien or the purchase money lien should be paramount. In the case of *Campbell Paint & Varnish Co. vs. Hall,* 95 So. 641 the stock of a merchant which had been bought for resale was levied on under a purchase money lien suit, and within four months bankruptcy ensued. In a contest between the trustee and the judgment creditor, the former relying on his status of a judgment creditor whose execution has been returned unsatisfied at the date of the bankrupt's adjudication, it was held that the purchase money lien prevailed. The lien existed prior to the levy to enforce it, and while the levy was within four months of bankruptcy, the lien was older. What would be

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17 Candlar v. Cromwell, 57 So. 554; Sack v. Gilmer Gro. Co. 115 So. 339. In this last case it was said, "Except for our registry statutes (Sec. 2787 Code 1906; Sec. 2446 Hemingway's Code 1927) it is undoubtedly true that a judgment creditor would be a volunteer and that a purchaser at an execution sale would obtain only the interest of the defendant in execution; but since the registry statute provides that conveyances and mortgages of lands must be recorded in order to be valid and effectual against subsequent creditors and purchasers, it is not true that a judgment creditor is always a volunteer and that a purchaser at an execution sale only gets the interest of the defendant in the execution. Nugent v. Preibatch, 61 Miss 402." " * * The registry statute applies with as much force to a creditor obtaining a lien by judgment as it does to a subsequent purchaser or incumbrancer.

18 Josselyn v. Stone, 28 Miss. 753.

19 Reed v. Hairland, 38 Miss. 323; Johnson v. Edde, 58 Miss. 664.

20 Walker v. Gilbert, Freeman Chancery; Kelley v. Mills, 41 Miss. 267; Pearson v. W. R. Moore Co., supra.

the result if no levy was made until adjudication has not been definitely decided but it would seem that the levy would be necessary before adjudication to perfect the purchase money lien.

A judgment, of course, did not operate as a lien at common law.[21] The lien was created by statute and depended on the right to issue execution, the right and not the execution itself being the test of the lien; Mississippi departed from the common law theory and made an enrolled judgment a lien of its own force and effect.[22] The modern tendency of legislation is in the direction of establishing the rule that no lien on personal property exists until a levy has been made thereon;[23] but where the lien does attach it becomes a charge on whatever estate the judgment debtor may have, whether his title is legal or equitable, perfect or inchoate.

The question has been raised as to whether the lien should apply to the stock in trade of a merchant. In the case of *Minshew vs. Davidson,* 86 Miss. 354 the judgment debtor sold his entire stock to a third person and the judgment creditor thereafter levied execution. Judge Truly said: "Upon enrollment the lien of a judgment binds all of the property of the defendant without regard to its character or description. So in the instant case, immediately upon enrollment on the 15th day of February, appellees acquired a lien on the stock of goods and merchandise then owned by their debtor, and which was subsequently conveyed to the appellant."

The Bulk Sales Statute was not in effect at that time. By the same reasoning the lien would attach to every article individually sold in the regular course of the mercantile business. The shopper or purchaser would not get a clear title, except such as might be implied by law or set up as an exception. Under the purchase money lien the seller waives his lien on such articles sold in the course of trade—the purpose of selling to the store keeper on credit is so he can sell to the customer and pay his debts. The judgment creditor has no such contract implied or otherwise; he may not even know the debtor is a merchant. But if the judgment debtor is in the mercantile business, selling part of his stock every day, thus depleting it an additional burden may be thrown on others by the lien of the judgment creditor

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21 15 Ruling Case Law, 793-794; Minor on Real Property, 165 and 692.
22 10 Id. 1263; 2 Freeman on Judgments (5th Ed.) Par. 938.
23 10 Id. Probably Mississippi, Alabama and Georgia are the only states making it a lien on personal property without levy.

attaching to the diminishing remainder. If the vendor or one who claims a purchase money lien and the customer-consumer, are protected there should be no reason why, unless the meaning of the statute is restricted by the policy of the statute or by waiver, under the above authority, the enrolled judgment should not be a lien on the mercantile stock. But in a contest between these parties it would seem that the more reasonable rule would be to require actual levy by the judgment creditor on the theory that the stock is daily shifting by sales and purchases and impossible of continued accurate description.[24]

A mortgage on a stock of merchandise is voidable, if not void, as against creditors, although as between the parties themselves it may be held valid.[25] Fraud is imputed by granting permission to the mortgagor to continue buying and selling.

Some questions have arisen where bankruptcy of the judgment debtor has intervened prior to execution. As bankruptcy does not interfere with liens which under the state law have been acquired four months prior to adjudication such judgment creditors insist on payment in full. As to specific property such as fixtures or auto vehicles no difficulty would arise. But if the lien is good against the stock of merchandise the matter is not so simple. It is suggested that the practical solution is this: It is the duty of the judgment creditor to make seasonable demand upon the trustee in bankruptcy, and the burden is upon him, as a party claiming priority of payment, to identify and segregate the articles and things upon which he claims a lien so as not to hamper the speedy collection and distribution of the assets of the bankrupt estate. By not so doing he waives his lien and is estopped to assert it in the bankruptcy court. The trustee under the direction of the court may be em-

24 In Campbell Paint & Varnish Co. v. Hall, it was urged that it is a crime to sell personal property upon which there is a lien by contract or by law, without informing the person to whom it was sold of the existence of the lien. The court said that the buyer would not be injured, and the vendor had consented to the sale.

25 Baldwin v. Little, 64 Miss. 126; Newton Oil Co. v. Carr, 63 Miss. 394; Tallman v. Tuttle, 65 Miss. 492. It was said recently that the purchase money lien is not the same character of security as a mortgage on a stock of merchandise intended for resale. Campbell Paint & Varnish Co. v. Hall, supra. In Pearson v. W. R. Moore Co., a purchase money lien suit was instituted on January 2nd and on the same day involuntary proceedings in bankruptcy filed. On January 5th the sheriff seized the goods. It was held that the trustee in bankruptcy acquired the status of a judgment creditor as of January 2nd, and the filing of the purchase money lien suit was not such notice as would come under Section 2436 Hemingway's Code. (3079 Code 1906.)

See interesting Article in Mississippi Law Journal for October, 1928, entitled "Use of the Writ of Scire Facias in Mississippi".

powered to sell the assets free from liens and the order thereon by the bankruptcy court is binding on the state courts; and the rule would be applied no matter where a resulting suit was brought. As the Bankruptcy Act sets aside liens acquired within four months, and as certainly some of the stock of merchandise has been acquired during the last four months preceding bankruptcy, diligence and identification will be exacted of the judgment creditor. As to other personal property not part of the stock of merchandise, it is presumed that the bankruptcy court will either sell it subject to the judgment lien or will enforce the valid state lien.

Clarksdale, Miss.

VOIR DIRE EXAMINATION OF JURORS

*The Federal Practice**

By Roger D. Moore

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . " *Amendment VI, Federal Constitution.*[1]

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law . . . " *Amendment VII, Federal Constitution.*[2]

"The end of challenge," says Coke, "is to have an indifferent trial, and which is required by law, and to bar the party indicted of his lawful challenge is to bar him of a principal matter concerning his trial." *Pointer v. United States*, 151 U. S. 396, 408 (1894).

Recent attention has been directed to rules adopted by several federal district courts whereby the examination of jurors upon *voir dire* has been taken from opposing counsel and placed in the trial judge with provision that additional questions desired to be put by counsel must be addressed to the discretion of the judge. Such rules and the practice under them have been upheld wherever reviewed in the Circuit Courts of Appeals,[3] and, although they

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* Reprint, Georgetown Law Journal.

1 This amendment is not a limitation upon the powers of the states but was intended exclusively to apply to the powers exercised by the federal government. Gaines v. State of Washington, 48 S. Ct. 468 (1928); Howard v. Kentucky, 200 U. S. 164 (1906). It is applicable to the District of Columbia, Capital Traction Co. v. Hof, 174 U. S. 5 (1899); and to the territories, Reynolds v. United States, 98 U. S. 145 (1879). A jury composed, as at common law, of twelve jurors, was intended by this amendment. Maxwell v. Dow, 176 U. S. 586 (1900).

2 There must be unanimity in finding the verdict. American Publishing Co. v. Fisher, 166 U. S. 466 (1897). It is a "fundamental guaranty of the rights and liberties of the people" and hence every reasonable presumption should be indulged against it. Hodges v. Easton, 106 U. S. 412 (1882). The court may not retain part of the facts for its own determination. United States v. Rathbone, 2 Paine, 578, 27 Fed. Cas. No. 16, 121 (1828).

The only modes known to the common law to re-examine facts tried by a jury are the granting of a new trial by the court where the issue was tried, or to which the record was properly returnable; or the award of a *venire facias de novo*, by an appellate court, for some error of law which intervened in the proceedings. Thorne v. Browne, 257 F. 519 (C. C. A. 8th, 1919), certiorari denied by the United States Supreme Court, 250 U. S. 645 (1919).

3 Falter v. United States, 23 F. (2d) 420 (C. C. A. 2d, 1928); Carroll v. United States, 16 F. (2d) 951 (C. C. A. 2d. 1927); Bradshaw v. United States,

have not as yet been taken before the Supreme Court of the United States by way of appeal or writs of certiorari they have been upheld indirectly in a number of instances by denials of certiorari by that court.[4]

The impetus to such rules was given to the federal courts by a recommendation of the Conference of Senior Circuit Judges, which was formed by act of Congress in 1922 to advise upon legislation affecting the judiciary and to promote effective judicial administration.[5] In common with the practice pervailing in most of the states *all* challenges in the federal courts are now required by provision of statute to be "tried by the court without the aid of triers"[6] as were employed at common law in challenges "to the favour *propter affectum*", that is, challenges based upon inconclusive circumstances of suspicion as distinguished from the "manifest" challenges wherein were involved *in law* conclusive presumptions of bias on the part of prospective jurors.[7] In jury trials, then, the position of the judge is no less important than in trials where he sits alone; for in the former he is charged with the duty of securing to the

15 F. (2d) 970 (C. C. A. 9th, 1926); Kurczak v. United States, 14 F. (2d) 109 (C. C. A. 6th, 1926); Noland v. United States, 10 F. (2d) 768 (C. C. A. 9th, 1926). But here the rule below seems to have prohibited counsel only from examining each juror individually. Murphy v. United States, 7 F. (2d) 85 (C. C. A. 1st, 1925); Ungerleider v. United States, 5 F. (2d) 604 (C. C. A. 4th, 1925).

In Fredericks v. United States, 292 F. 856 (C. C. A. 9th, 1923), no rule as such was involved, but it was held that the trial court was within its sound discretion to require a certain question to be put to the prospective jurors *en masse*.

In Beatty v. United States, 27 F. (2d) 323 (C. C. A. 5th, 1928), the judge below apparently conducted all of the *voir dire* examination without objection, and this seems to have been the procedure in the somewhat earlier case of Armborst v. Cincinnati Traction Co., 25 F. (2d) 241 (C. C. A. 6th, 1928).

In Tierney v. United States, 280 F. 322 (C. C. A. 4th, 1922), it was held immaterial that the clerk had conducted the examination under direction of the court.

4 Carroll v. United States, 273 U. S. 763 (1927). See *supra*, n. 3. Murphy v. United States, 269 U. S. 584 (1925). See *supra*, n. 3. Ungerleider v. United States, *supra*, n. 3. In Shively v. United States, 299 F. 710 (C. C. A. 9th, 1924), the Supreme Court denied certiorari where the Circuit Court of Appeals had held it to have been within the sound discretion of the trial judge to have required all general questions to be addressed to the entire panel.

5 Public No. 298 of September 14, 1922, 42 Stat. 837, 838; U. S. Code, Title 28, Par. 218, providing in part: "It shall be the duty of every judge thus summoned . . . to advise as to the needs of his circuit and as to any matters in respect of which the administration of justice in the courts of the United States may be improved."

See also: *The Business of the Supreme Court*, by Felix Frankfurter and James M. Landis, 243, 249 (Macmillan, 1928; see "Book Reviews", *infra*, p. 79).

6 U. S. R. S., Par. 819; Jud. Code, Par. 287; U. S. Code, Title 28, Par. 424.

7 See "*Voir Dire Examination of Jurors*: *I. The English Practice*", by the present author, 16 GEO. L. J. 438, 441 *et seq.* (1928).

parties impartial persons other than himself to try the facts in issue. Because of his comparative disinterest, to place *voir dire* examinations directly in his hands, is obviously to strip such examination of its non-essentials, even though further questions may be sought through him. His function thereby assumes an even greater importance. For our purpose it is not enough to repeat the general rule that the extent to which *voir dire* examinations should go rests in the sound discretion of the trial judge. In the interest of accuracy we must direct our attention to the reported cases in the federal courts to determine how far such simplification may legitimately go in those courts.

VALIDITY OF RULES BARRING COUNSEL FROM DIRECT EXAMINATION

In the Supreme Court of the District of Columbia a new rule of court providing for *voir dire* examinations exclusively by the trial judge is confined to criminal practice.[8] It has not as yet been subjected to review by the District Court of Appeals, inasmuch as to date trials under it have either resulted in acquittals, or have not been appealed, or have not involved exceptions to it properly saved. But it has been applied to two vigorously contested cases of great public magnitude in which the selection of truly impartial juries was apparently difficult in view of wide-spread notoriety given to the cases by the press. In this study of the federal practice in *voir dire* examination it will be instructive to consider the practice under the rule as it has so far appeared against the back ground of cases formerly reported in the District of Columbia and elsewhere.

In *United States vs. Harry F. Sinclair,*[9] involving an alleged conspiracy to defraud the United States in the leasing of certain public oil lands, fifty-five veniremen were examined by the trial judge and a jury formed from them in approximately five hours, whereas in a previous trial of the same case had before the adoption of the rule approximately

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8 Paragraph 2 of Law Rule 70, adopted January 6, 1928, but by amended Par. 65 of the Code of Laws, D. C., not going into effect until thirty days thereafter, as follows: "In criminal cases the examination of jurors upon *voir dire* shall be conducted by the Justice. Counsel may suggest such questions as they desire to have put and the Justice shall put them if in his opinion they are proper."

9 Criminal No. 43324, Vol. 1 of the Transcript of Proceedings in the retrial. Another defendant, former Secretary of the Interior Fall, was not on trial at this time.

seven hours were used by counsel in the examination of a total of thirty-seven veniremen for the same purpose.[10]

In the second trial of this case the trial judge upon his own motion put to the prospective jurors *en masse* questions covering the following: acquaintance with any of named counsel or defendants, first-hand knowledge of anything about the case, the formation or expression of any opinion as to the guilt or innocence of defendants, and the reading of anything about the case. Practically all the prospective jurors had read newspaper accounts; these were examined individually by the court to determine whether opinions thereby formed could be laid aside and a finding based solely upon the evidence to be introduced in the course of the trial. The following additional questions submitted by counsel were also put by the court to the prospective jurors *en masse*: whether any of them had been on the "grand jury which had considered any of the so-called Oil Cases"; had been or at the time was employed by the United States government or had business relations with the same; had ever discussed the case with anyone who purported to have knowledge of the facts; had read any newspaper accounts respecting the investigation of any Congressional committee upon such facts; or had heard any speeches broadcast by radio with regard to the same. To individual jurors called into the box to fill vacated places the court put the questions theretofore put to the whole panel collectively.

After putting the foregoing questions the court refused, upon written request of counsel, to question the veniremen either collectively or individually as to:[11] business relations or acquaintance with *all* the assistants of the United States Attorney for the District of Columbia; having *any* relatives at *any* time in the employ of the United States; the reading of newspaper accounts of the former trial; the requiring of evidence to remove an opinion or the amount of such evidence, if required; looking upon defendant "as does the law, as an innocent man"; approaching the case without fear of public opinion and without influence of possible public or private criticism.

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10 Criminal No. 43324, Vols. 1 and 2 of the Transcript of Proceedings in the first trial beginning October 17, 1927. Before all evidence in this trial of the case was in, the Court declared a mistrial, because of the disclosure of evidence tending to show an improper surveillance of members of the jury by agents of defendant.

11 See Transcript of Proceedings, p. 161, *supra*, n. 9, for questions in full.

In *United States vs. Robert W. Stewart,*[12] involving an alleged violation of a federal statute making it an offense to refuse to answer questions put by a duly constituted committee of the House or Senate, the prospective jurors were subjected to much the same kind of examination by the court as there had been in the Sinclair trial. In the former the trial judge had followed the new rule and, over objections and exceptions of defense counsel, refused them permission to examine on the *voir dire.*[13] Practice in the Stewart trial went farther in that the court refused, likewise over objections and exceptions of defense counsel, to allow *voir dire* examination by counsel for defendant, "defendant through his counsel" or even "defendant in proper person".[14] This examination was a comparatively short one in that there were very few disqualifications made and these without challenge by counsel of either side.

Whether it is expedient in every instance to prohibit counsel from examining prospective jurors directly may be a matter of opinion. But the legality of such practice in general cannot now be questioned in light of the decisions.

Thus, the latest opinion in the matter,[15] coming from a federal appellate court lays down the rule as being that "the impaneling of jurors is within the control of United States courts by rules, subject to such settled principles of the criminal law as are essential to securing impartial juries", and furthermore asserts:

> "while it was the custom at common law to allow the parties to cross examine, there is nothing in this essential to securing a panel free from bias. The length and particularity of the examination of jurors had become a scandal and required some effective control. So long as the

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12 Criminal No. 46753, Transcript of Proceedings, p. 7. The prosecution was under Sec. 102 of the Revised Statutes.

13 In following the published rule Justice Bailey reminded counsel: "I may add that I had adopted this practice before when I was in the criminal court and that I would have continued to follow it even though the rule had not been enacted." Transcript, p. 18, *supra,* n. 9.

14 Transcript of Proceedings, p. 25 *et seq., supra,* n. 12. In the trial of this case the rule itself was objected to as being: (a) beyond the power of the court to promulgate, (b) legislative, (c) derogatory to a substantial common law right and a right conferred by Maryland statute made part of District of Columbia law by act of Congress, (d) discriminatory in drawing an unreasonable distinction between civil and criminal cases. In corollary, defense counsel further attacked it as denying the means of ascertaining grounds upon which to base challenges for cause and of disclosing information to enable him intelligently to exercise peremptory challenges "in defendant's absolute discretion", and finally as denying a constitutional right to be represented by counsel.

15 Falter v. United States *supra,* n. 3, following Carroll v. United States, in the same (2nd) circuit in which certiorari had been denied, *supra,* n. 3 and 4.

> power is exercised with reasonable regard for the rights of the accused, it fulfills the requirements of the law.''

Two years earlier the Supreme Court had refused certiorari to review this practice upheld in the Fourth Circuit in which the Circuit Court of Appeals there had said:[16]

> ''No authority tending to show that there was any error in the action of the court has been brought to our attention. The practice is one which has been followed in many districts from time out of mind. It not only saves much time, but has other manifest advantages.''

As to subject matter, the reports show the cases where the validity of the rule was questioned and declared valid to have involved: conspiracy to defraud the United States, perjury, attempting to bribe a juror, illegally importing and transporting liquor, violation of the White Slave Act, fraudulently altering certain Liberty bonds, and conspiracy to violate the National Prohibition Act.[17] It is to be noted that the rule has not yet been tested on appeal as to its applicability to *civil* cases before a jury, although so far as the reports go no distinction has been made in the wording of the rules in this regard with the exception of the one in effect in the Supreme Court of the District of Columbia.[18]

THE PROPER SCOPE UPON PRINCIPLE OF THE EXAMINATION

In General. Prior to the inception of such rules of court great latitude was allowed the trial court in conducting the voir dire examination. Thus in *St. Clair vs. United States,*[19] involving the review of a conviction for murder on the high seas, a rule of court requiring each juror to be challenged or accepted or accepted and sworn in the case ''as soon as his examination is completed, and before the examination of another juror'', was upheld by the Supreme Court, notwithstanding defendant's due insistence upon a right to examine all jurors as to qualifications before being required to

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16 Ungerleider v. United States, *supra,* n. 3 and 4.

17 The subject matter here follows the inverse chronological arrangement of the cases themselves in n. 3, *supra.*.

18 n. 8, *supra.*

The rule in the United States District Court for the Southern District of New York is as follows: ''The Judge alone shall examine all jurors on the *voir dire.* If either counsel desire that he shall examine as to additional matters, he shall state the same, and the Judge, if the matter be proper in his opinion, shall further examine the jurors in respect thereof.''

This is substantially as recommended by the Conference of Senior Circuit Court Judges. 10 Am. Bar Asso. J. 875 (1924).

19 154 U. S. 134, 147 (1894).

exercise the privilege of peremptory challenging any of them. The same court in a latter case denied certiorari to the court of appeals which had held the action of the trial court in requiring all general questions to be addressed to the entire panel, as within its sound discretion.[20] Even a juror's own opinion under oath as to his own impartiality is not binding on the court, although "the court should consider the statements made under oath by the juror himself in reference to his impartiality."[21]

Difficulty is obviously to be expected in actually securing the essential right to trial by an impartial jury where the particular case has acquired considerable public notoriety. That this is so was seen even in the early days of the nation by Chief Justice Marshall when he said:[22]

> "Perhaps on general and public questions it is scarcely possible to avoid receiving some prepossessions, and where a private right depends on such a question the difficulty of obtaining jurors whose minds are entirely uninfluenced by opinions previously formed is undoubtedly considerable. Yet they ought to be superior to every exception, they ought to stand perfectly indifferent between the parties . . . ."

And at a more recent time the Supreme Court of the United States recognized the difficulty in *Reynolds vs. United States*:[23]

> "In these days of newspaper enterprises and universal education, every case of public interest is almost, as a matter of necessity, brought to the attention of all the intelligent people in the vicinity, and scarcely any one can be found among those best fitted for jurors who has not read or heard of it, and who has not some impression or some opinion in respect to its merits. It is clear, therefore, that upon the trial of the issue of fact raised by a challenge for such cause, the court will practically be called upon to determine whether the nature and strength of

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20 Shively v. United States, n. 4, *supra*, quoting at length from Fredericks v. United States, n. 3, *supra*. Certiorari denied in the former, by the United States Supreme Court, n. 4, *supra*, which ten years before had termed as elementary the proposition that the exclusion of jurors as a result of their preliminary examination involved a matter "within the sound discretion of the court". Texas & Pacific Railway v. Hill, 237 U. S. 208, 214 (1915).

21 Remus v. United States, 291 F. 501, 507 (C. C. A. 6th, 1923); certiorari denied 263 U. S. 717 (1924). See Beatty v. United States, *supra*, n. 3.

22 Mima Queen & Child v. Hepburn, 7 Cr. 290, 297 (1813), coming up from the Circuit Court for the District of Columbia. The holding by the Supreme Court was merely that the trial court had exercised sound discretion in instructing triers that the challenged talesman "did not stand indifferent between the parties", following a statement by the questioned juror, in a proceeding upon a petition for freedom, that he would find for petitioner if the evidence were evenly divided, because of his adversity to slavery.

23 *Supra*, n. 1, for bigamy in federal territory. The most recent case upon this particular point conclusively follows the Reynolds case: Holt v. United States, 218 U. S. 245, 248 (1910), the trial being for murder.

> the opinion formed are such as in law necessarily raise the presumption of partiality . . . ''

This Reynolds case is particularly noteworthy in that in it there is not involved a statute declaring opinions formed from newspaper accounts to be no bar even though the juror may require evidence to remove such opinions, where the court is satisfied from all the *voir dire* examination that the challenged juror is competent to render a true verdict upon the evidence and in accordance with the instructions of the court, such as is found in two later cases decided by the same court[24] and similar to the bill as introduced in the present Congress ''to expedite judicial procedure, and to obtain more intelligent jurymen''.[25]

The Supreme Court of the District of Columbia sitting on appeal in general term before the institution of the District Court of Appeals amplified the Reynolds holding to a remarkable extent, saying in the leading case of *United States vs. Barber*:[26]

> ''The almost universal test proposed to ascertain whether the juror entertains a bias or prejudice against the prisoner is to inquire whether he has formed or expressed an opinion as to his guilt or innocence. To remain satisfied with his categorical reply, whether in the affirmative or negative, in a case that has attracted general attention, might do injustice to the prisoner, or to the government . . . The duty of the examining authority, instead of ceasing when the citizen, in either case, has made his general claim to exemption, may more properly be said to have then really begun.''

In this case it was recalled that ''in the Burr trial,[27] every one of the hundreds of persons summoned as jurors, with scarcely one exception, answered on his *voir dire* that he had formed an opinion . . . but impartial jurors were finally obtained . . . by careful analysis by the court of the sources and extent of their alleged opinions.''[28]

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24 Hopt v. Utah, 120 U. S. 430 (1887); Spies v. Illinois, 123 U. S. 131, 165-179 (1887).

25 S. 1748, 1st Session, 70th Congress, now favorably reported out by the Committee on the Judiciary, but with modifications such as to make it inclusive of all opinions whether or not formed merely from the reading of newspaper accounts or through conversing about the merits of the controversy. The bill as reported out by the Committee provides only that the court be satisfied that the prospective juror ''is possessed of the necessary intelligence, education, and ability to render a fair and impartial verdict . . . ''

26 21 Supreme Court, D. C. 456 (1893). The D. C. Court of Appeals was created Feb. 9, 1893, by an act of Congress by which the new court took the place of the Supreme Court in General Term. 47 Stat. 434 (1893).

27 United States v. Aaron Burr, 25 Fed. Cas. 55-83, No. 14693 (1807).

28 Subsequent cases decided by the Court of Appeals of the District of Columbia are in accord with this case. The first one asserts that in order

It is readily to be concluded from the decisions that there is a considerable field in which questions may properly be put, but in which also refusal to permit the same questions would not constitute reversible error. To quote again from the *Reynolds* case:[29]

> "It must be made clearly to appear that upon the evidence the court ought to have found the juror had formed such an opinion that he *could not in law be deemed impartial.* The case must be one in which it is manifest the law left nothing to the conscience or discretion of the court." [30]

A case on writ of error in the Eighth Circuit serves to accentuate this distinction by conceding that, even though "the juror *could* have been *properly* excused . . . the question presented to us is not the same as the one presented to the trial judge", inasmuch as "no less stringent rules should be applied by the reviewing court . . . in such a case than those which govern in the consideration of motions for new trial because the verdict is against the evidence".[31]

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for there to be reversible error in restricting or enlarging the scope of the examination, it must be "made very plainly to appear that the rights of the appellant were thereby prejudiced". Howgate v. United States, 7 App. D. C. 217, 236 (1895).

A second one states: "Qualification is a question of mixed law and fact submitted to the sound discretion of the court," which ought not be disturbed, "unless there be disclosed *manifest error to the prejudice of the accused.*" (Italics author's.) Horton v. United States, 15 App. D. C. 310, 319 (1899), citing with approval Connors v. United States, 158 U. S. 408, 413; Garlitz v. State, 71 Md. 293, 301 (1899); and Howgate v. United States, *supra*... And when last confronted with the matter the court said: "The discretion of the trial court . . . will not be disturbed *unless it is made clearly to appear that, upon the evidence, there was no room for the exercise of discretion by the court.*" (Italics author's.) Miller v. United States, 41 App. D. C. 52 (1913), citing with approval Howgate v. United States, *supra;* Horton v. United States, *supra;* Reynolds v. United States, *supra,* n. 1 and 23; and Gallot v. United States, 87 F. 446 (C. C. A. 5th, 1898).

29 *Supra,* n. 1, 23 and 28.

30 The Circuit Court of Appeals for the Fourth Circuit has recently spoken in similar terms: "The action of the trial court, in so far as the same related to the acceptance of jurors and the ascertainment of their eligibility, had relation to a subject largely within its discretion, and this court should be slow to disturb its ruling in the premises unless some plain error was committed of a prejudicial character." Assaid v. United States, 10 F. (2d) 752, 753 (1926), citing with approval the following: Reynolds v. United States, n. 1, 23, 28, and 29, *supra,* Hopt v. Utah, n. 24, *supra,* Spies v. Illinois, n. 24, *supra;* Holt v. United States, n. 23, *supra;* Tierney v. United States, n. 3, *supra,* and Kelly v. United States, 293 F. 689, 692, 693 (C. C. A. 4th, 1923).

31 Pearson v. Rocky Mountain Fuel Co., 219 F. 496 (C. C. A. 8th, 1915), extracting but not quoting from Reynolds v. United States, n. 1, 23, 29 and 30, *supra.* The most recent case in this field, to which the Supreme Court denied certiorari October 15, 1928, justifies the holding of the C. C. A. for the Ninth Circuit that "the trial judge necessarily exercises a measure of discretion, and no abuse is shown". Brady v. United States, 26 F. (2d) 400, 403 (1928).

For Purposes of Peremptory Challenge.[32] The Supreme Court of the United States has never defined clearly and completely the scope to which parties may properly demand that the trial court take, or that they be permitted to take, *voir dire* examinations of jurors with a view to the rejection of some or all of them. That court *has* stated without equivocation in the case of *Pointer vs. United States*[33] that there is an essential right to "an opportunity to participate in the examination to such extent as was necessary to ascertain whether any of them were liable to objection for cause"[34] (although such examination preceding challenge is clearly at variance from the settled English practice);[35] and also "an opportunity . . . for such inspection and examination . . . as is required for the due administration of justice".[36] But by reason of its partial silence in the

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32 Before a federal statute allowed peremptory challenges such challenges were permitted in the federal courts by rule of court alone, it not being considered that the common law provisions thereto applied of their own force; United States v. Aaron Burr, n. 27, *supra;* see U. S. v. Randall, 27 Fed. Cas. 696, No. 16118 (1869). The federal statute allowing peremptory challenges are first to have been enacted in 1872, 17 Stat. 282, c. 332, Par. 2, incorporated in R. S. Par. 819 and in Par. 287 of the Judicial Code, 36 Stat. 1166, United States Code, Par. 424. Under it peremptory challenges are allowed as follows: in capital offenses or treason, the government 6 and defendant 20; in other felonies, the government 6 and defendant 10; in all offenses and in civil causes, the government 3 and defendant 3. In the District of Columbia the government is allowed 20 such challenges as is defendant, in other felonies 10 as is defendant, and in all other cases, civil as well as criminal in which plaintiff is the United States, each party is entitled to three peremptory challenges. Code of Law, D. C., Par. 918. Under Par. 72 of this Code a special panel of 20 is allowed in civil causes from which each party strikes four.

In an early case the Supreme Court of the United States recognized a "qualified and conditional" exercise of the right to peremptory challenge in the government "to put aside any of the jurors, until the whole panel is gone through". United States v. Marchant, 12 Wheat. 480, 482 (1827). This is in accordance with the English precedents but is certainly not the practice today in this country and is probably questionable law, although it does not seem to have been overruled. See Hayes v. Missouri, 120 U. S. 68, 71 (1887).

33 151 U. S. 396, 412 (1894). "The right of peremptory challenge . . . is not of itself the right to select, but a right to reject jurors." Hayes v. Missouri, n. 32, *supra.* See also Pearce v. United States, 192 F. 561 (C. C. A. 5th, 1912); St. Clair v. United States, n. 19, *supra,* at pp. 147, 148.

34 n. 33, *supra,* at p. 406 of the report.

35 *Voir Dire Examinations of Jurors: I The English Practice,* n. 7, *supra.* Witness 4 Blackstone's *Commentaries* 353, quoted in Lewis v. United States, 146 U. S. 370 (1892) and in United States v. Marchant, n. 19, *supra,* at p. 482 of the report.

36 Pointer v. United States, n. 33, *supra,* at p. 406 of the report. Here the Supreme Court further said: "In the absence of such rule or order . . . the mode of designating and impaneling jurors for the trial of cases in the courts of the United States is within the control of those courts, *subject only* to the restrictions Congress has prescribed, and also to such limitations as are recognized by the settled principles of criminal law to be essential in securing impartial juries for the trial of offenses."

matter in that particular case, it might be argued that it did not consider as requisite to the "due administration of justice" a corresponding right to question for purposes of peremptory challenge. And this seems to have been the view at first taken by the lower federal courts.[37] But the more recent decisions of those courts show a decided trend toward the general rule as it exists in most of the state courts *i.e.,* that there may properly be required such examination as will enable a party intelligently to exercise peremptory challenge.

Thus, the important case from the First Circuit, of *Murphy vs. United States,*[38] in which the Supreme Court denied certiorari, opened the way to such a trend when it stated that there would be no exercise of the required "sound discretion" where there was an arbitrary denial of "such examination . . . as may disclose *any prejudice or bias on the part of jurors".* It is to be noted that the words of the court here are not confined, as are those in the earlier Pointer case above-quoted, to questioning for the acertainment of liability to objection for cause.

Going a step further, the Circuit Court of Appeals for the Sixth Circuit has suggested, but not decided, that there *may be* a substantial right to the extension *to counsel* of a personal examination of a particular juror for purposes of peremptory challenge "when there is reason to believe that he needs such privilege in order to exercise peremptory challenge intelligently", to deny which extension might well constitute prejudicial error.[39] These words of the court outline a rule for practical procedure reasonably calculated to expedite justice and at the same time insure the fundamental rights embedded in due process, to-wit, questions may be put as of right for the purpose of peremptory chal-

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37 Browne v. United States, 145 F. 1, 7 (C. C. A. 2d, 1905), affirming 126 F. 766 and 128 F. 615; certiorari denied 200 U. S. 618 (1906); the Court of Appeals saying that defendant's right is sufficiently secured "by his being provided in advance of the drawing with a list of the names and residences of the jurymen constituting the panel (and the subsequent panel of talesmen) from whom the 12 were to be drawn". But the offense here involved was not capital and consequently reference of the court to furnishing such a list is not clear. Under the Revised Statutes then in force it was required to be furnished only in capital cases, and then two or three days before trial as the case might be.

The essentials to the free exercise of the right of challenge are: "First, that the defendant shall have access to the list of jurors; and, second, that he shall have presented to him face to face for challenge jurors ascertained to be legally qualified." Tierney v. United States, n. 3 and 30, *supra,* at p. 324 of the report.

38 n. 3, *supra,* at p. 87 of the report.

39 Kurczak v. United States, n. 3, *supra,* at p. 110 of the report.

lenge only upon a satisfactory showing made to the court of facts actually in the case warranting the particular questions, provided the court require at its discretion that such a showing be made. In connection with this case, *Quaere,* is there a "personal examination" where counsel is required to put *all* questions through the court?

Inasmuch as questions put for the purpose of challenge for cause readily show upon their face their purpose to disclose personal knowledge of the facts at issue, an unqualified opinion, pecuniary interest, religious beliefs and conscientious scruples in certain instances, unwillingness to be governed by the established rules of evidence, certain relationships in which bias is conclusively presumed, membership on the grand jury which returned the indictment or on a petit jury previously returning a verdict in the same case,[40] or certain disqualifications fixed by statute,[41] no purpose would generally be served by requiring such independent showing to be made with regard to them.

Probably the surest way of determining the extent to which the trial court may go in restricting questioning upon *voir dire* is to examine the reported cases upon their own facts with a view to ascertaining the demarcations now existing. The remainder of this treatment will be so directed to rulings upon specific questions.

PROPER SCOPE OF VOIR DIRE EXAMINATION UPON THE PARTICULAR FACTS OF THE REPORTED CASES

Where There Was No Error Below. The Supreme Court of the United States has taken but few occasions to pass upon rulings made below upon specific questions. Aside from its indirect approvals through denial of certiorari, it has in a few decisions refused to find prejudical error

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The appellate court here approved "as a proper and often very desirable practice" the lower court's conduction of all the examination coupled with the offer to put proper questions desired by counsel. Its suggestion as to "personal examination" by counsel goes far but has not subsequently been followed to its liberal conclusion by this court or any of the cases reported in the other circuits. See *supra,* n. 3.

40 One must turn to the common law and in particular the state decisions applying it to modern situations, if he would inform himself as to challenges for cause, for federal cases in the field are few in number and far from exhaustive in content. See: *Voir Dire Examination of Jurors*: *I English Practice,* n. 7 and 35, *supra;* 35 C. J. pp. 312-358; 16 R. C. L. pp. 254-299.

41 The qualifications set forth in Par. 215 of the Code of Laws, D. C., have been held not to furnish the only test of the juror's competency. See Crawford v. United States, 212 U. S. 183 (1909), holding the common law disqualification of employer and employee to be still in force; and see also to the

(or for that matter, *any* error) in the exercise by the trial judge of his "sound discretion" in the *voir dire* examinations.[42]

In what seems to be its most recent decision by that court in this field,[43] involving the prosecution of socialists for violations of the Selective Draft Law of 1917, there was upheld without further comment a ruling of the trial court that defendants were not entitled to ask of juror whether they distinguished between socialists and anarchists. Some fifteen years earlier the same court, in reviewing a conviction had below for first degree murder, held it not error to have permitted the district attorney to ask a juror whether he had any conscientious scruples which would preclude him from rendering a verdict of guilty on circumstantial evidence "in a case where the penalty prescribed by law *is* death", whereas in fact such penalty was optional in the jury in that they might under the law add to a verdict of guilty the words "without capital punishment".[44]

Perhaps the most instructive decision by the Supreme Court is that of *Connors vs. United States,*[45] decided in 1894 and involving prosecution under an indictment charging interference with judges of election in violation of a federal statute. Written questions had been sought to be put on *voir dire* to show party affiliations and activities at the time of the election specified in the indictment, but the trial court barred them. This ruling the highest court held proper on the ground that the law presumes interest in proper elections irrespective of party affiliations, which presumption is not removed unless it be "*made otherwise to appear* that the particular juror has himself by his conduct or declarations given reason to believe that he will regard the case as one involving the interests of political parties rather than the enforcement of a law". And since no connection between a Committee of 100 was shown with the particular prosecution, the question as to whether a

same effect, United States v. Griffith, Criminal No. 37630, Supreme Court, D. C.

State laws are controlling as to the *qualifications and exemptions* of jurors in the federal courts but state laws and usages relating to the *designation and impaneling* are not binding on the latter courts. Pointer v. United States, n. 33, 34 and 36, *supra,* at p. 407 of the report; Christianson v. United States, 290 F. 962 (C. C. A. 6th, 1923).

42 The readily apparent disposition on the part of federal judges to restrict *voir dire* examinations is to be contrasted with the general tendency in the state courts to allow great latitude in them. See Spies v. Illinois, n. 24 and 30, *supra.*

43 Ruthenberg v. United States, 245 U. S. 480 (1917).

44 Hardy v. United States, 186 U. S. 224 (1901).

45 Connors v. United States, n. 28, *supra.*

prospective juror had ever belonged to that organization was *also* held to have been properly excluded. Recently the Supreme Court has denied certiorari to the lower appellate court which had held it to be no ground for challenge for cause that a prospective juror be a member of or have contributed to any organization for the purpose of enforcing the prohibition law.[46]

The case which is most completely reported as going furthest in recognizing wide discretion in the trial judge is that of *Murphy vs. United States,*[47] decided in 1925 and to which likewise the Supreme Court denied certiorari. In this case, involving conspiracy to defraud the United States by illegally altering certain registered Liberty bonds, the Circuit Court of Appeals for the First Circuit held that it was sufficient for the trial court to have stated to the jurors the purport of the indictment and then to ask if there was any reason why any of them could not fairly and impartially try defendant, and direct that, if there was, he should stand aside. It was held on appeal not to have been improper for the trial court to have refused to permit a line of questioning thereupon suggested by counsel as follows: whether the jurors had ever lost bonds, whether the fact of an indictment would prejudice them against defendant, whether they could sit fairly, whether if they themselves were on trial they would want jurors of similar mental attitude in their places, and in general "whether their mental attitude is such that, if selected, they can give the defendant a fair and impartial trial under the Con-

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46 Remus v. United States, n. 21, *supra.*

47 n. 3, *supra,* certiorari denied 269 U. S. 584 (1925). The court of appeals here asserted that it would adhere to the Massachusetts practice (in which state the trial court sat), through which it was discretionary in the courts of the state whether court or counsel examine.

48 By way of precedent it has been held proper for the trial court to refuse to permit jurors to be questioned whether they would require evidence to remove opinions formed by reading newspaper accounts of a former trial of defendant on the same charge, on the ground that the jurors apparently did not understand the meaning of such question. United States v. Barber, n. 26, *supra.*

In 1909 in a prosecution for conspiracy to defraud the United States of public lands it was held to have been within the discretion of the court to refuse a question as to whether the jurors would consider it fraudulent for a man to loan a homestead applicant money to pay his fees and commissions, inasmuch as such a question "involved a rule of law concerning which . . . men in general are not supposed to be accurately informed". Richards v. United States, 175 F. 911 (C. C. A. 8th, 1909).

In 1916 in a prosecution for using the mails to defraud it was held to be no abuse of discretion that counsel had been restrained from asking questions calculated to be misunderstood, where the court suggested that the question be asked in clearer form. Watlington v. United States, 233 F. 247 (C. C. A. 8th, 1916).

stitution of the United States''. Obviously, the holding here is an extreme one, and hence, as we shall see, has not been subsequently followed in its entirety.

A group of prosecutions for violation of the National Prohibition Act set out the undesirability of hypothetical questions or those anticipating certain instructions by the court, the reasoning behind the rulings no doubt being (although not expressly so) that a layman should not be required to answer questions calculated to be misunderstood by reason of the non-technical nature of his knowledge and viewpoint.[48]

In the first of these cases,[49] decided about a year after the *Murphy* case *supra,* the Court of Appeals for the Ninth Circuit sustained the court below in its refusal to permit an examination of the jury separately and the asking of the following general questions: (1) Now, do you know of any reason at all that would prevent you doing by these men as you would like to be done by you, if you were situated in similar circumstances? (2) You realize that every man is presumed to be innocent until proven guilty by evidence which convinces your mind beyond a reasonable doubt? (3) And if, after hearing all the evidence you have a reasonable doubt as to the guilt of these men, or either of them will you follow the instructions of the court and give them the benefit of such doubt? It has since been held on appeal in the Sixth Circuit that a question as to how jurors would vote in case the testimony were equally divided was properly excluded, the court saying:[50]

> ''It is trifling with the time and procedure of the court to assume that jurors will not obey the court's instructions properly to be given.''

This in effect was the holding in a somewhat earlier case in the Sixth Circuit[51] in which it was held on appeal that a question propounded to the jurors as to what their verdict would be in case there was insufficient evidence to establish guilt in their minds ''beyond a moral certainty and a reasonable doubt'', was properly excluded.

And at about the same time the Court of Appeals for the Ninth Circuit[52] sustained the refusal of the trial court to permit the following questions: (1) Could defendants rely upon you to vote for no verdict except what you thought

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49 Bonness v. United States, 20 F. (2d) 754, (C. C. A. 9th, 1927).

50 Kurczak v. United States, n. 3 and 39, *supra,* involving a prosecution for the illegal importation of intoxicating liquor. Neal v. United States, n. 57, *infra,* indicated that a similar question *might* properly be put.

51 Christianson v. United States, n. 41, *supra.*

52 Fredericks v. United States, n. 3, *supra.*

was right, irrespective of what the other jurors did, except as they might influence you by legitimate argument? (2) The fact that seven or eight, or even more, of the other jurors voted differently . . . would not influence you to vote that way?

As to questions involving personal knowledge of facts in the case and opinions, there are two cases. In one of them[53] it was held not error, in the prosecution of a physician for illegal dispensing of narcotic drugs, in which the defense apparently was dispensation for treatment purposes, to refuse to allow counsel for defendant to ask jurors whether they had any preconceived ideas as to the proper method of treating drug addicts. In particular it was held proper to refuse question as to whether such preconceived ideas, if any, had been formed during service as grand jurors. In a White Slave case later[54] the refusal of the trial court to allow a question on *voir dire* as to "whether any of them had ever been a witness in a similar case" was upheld.

Where There Was Error Below. In a case decided on appeal by the Circuit Court of Appeals for the Eighth Circuit in 1918,[55] in which the trial court had conducted most of the *voir dire* examination, it was held fatal error for questions to be directed toward convincing jurors of the pressing desirability of their having no scruple against capital punishment, rather than pursuing the sole object of determining whether they would approach the issue in the proper frame of mind. The court must take care not to appear argumentative in the examination lest its attitude appear to be a preconceived opinion upon the merits yet to be passed upon.

Likewise in the Ninth Circuit it was held on appeal in 1925[56] to have been fatal error for the prosecuting attorney to be permitted to reprove a juror for his verdict of acquittal in a similar prosecution by stating that there was evidence to the effect that an unimpeached government witness had bought liquor from defendants upon search under valid search warrants, and then asking, "What more testi-

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53 Hoyt v. United States, 273 F. 792, (C. C. A. 2d, 1921).

54 Noland v. United States, n. 4, *supra.*

55 Manuel v. United States, 254 F. 272, (C. C. A. 8th, 1918). The Court of Appeals of the District of Columbia in 1895 asserted it to have been within the sound discretion of the trial court to permit the district attorney to ask whether the lapse of six years between the commission of the offense and the finding of the indictment would create prejudice against returning verdict under the evidence and instructions. Howgate v. United States, n. 26, *supra.*

56 Filippelli v. United States, 6 F. (2d) 121 (C. C. A. 9th, 1925).

mony do you require to prove a prohibition case than that?'' Even though the juror addressed here was excused upon challenge, the conduct of the prosecutor was held prejudicial as affecting the free exercise of judgment by the remaining jurors.

Coming down to the immediate past, we find a number of cases which mark a tendency of the Circuit Courts of Appeals to hold the courts of the first instance to a stricter account in their conduction of the *voir dire*. Thus within the past year in the Fourth Circuit[57] a judgment below was reversed on the sole ground that such inquiries had not been permitted defendant ''as will enable him in the exercise of his discretion to exclude from the jury persons who have formed fixed opinions about the case and are not fair and impartial jurors within the contemplation of the law''. The situation here was unusual in that this was a new trial in which defense counsel avowed that jurors who had heard the evidence in the former trial were included in the panel. The jurors were asked collectively by the court whether any of them had formed *and* expressed an opinion as to the guilt or innocence of the accused, but, improperly, the court refused to word the question in the alternative as to whether any of them had formed *or* expressed such opinion.

As distinguished from the Murphy case[58] (in which there was no reversal although the court went far in denying questions), it is particularly to be noted that negative responses to questions whether any of the jurors were related to defendant and whether there was any reason why they could not give both sides a fair trial, did not bring the action of the trial judge as a whole within his sound discretion. Under the English practice, where as has already been noted, no examination can proceed challenge and where a juror cannot himself testify as to his own bias, the court's ruling would have been more nearly correct. Actually, we must concede that a fixed opinion formed but not expressed ought to be considered, as the court here considered it, to be as fatal to requisite impartiality as though it might be proved by the more circuitous route of testimony of persons other than the juror himself.[59]

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57 Neal v. United States, 22 F. (2d) 52 (C. C. A. 4th, 1927). See n. 50, *supra*.

58 n. 3 and 4, *supra*.

59 In Assaid v. United States, n. 30, *supra*, where jurors admitted formed but not expressed opinions, the court of appeals held that such formation ''is not of as much moment . . . as when the same had been expressed'', and because the same jurors had substantially stated upon the examination that they would give defendant a fair trial, refused to reverse the judgment below.

But it has remained for two decisions handed down in the past few months to mark the line of departure from sound discretion most sharply. In the first[60] of these, which involved an action for personal injuries, there was a reversal because (upon one ground) the trial court had refused to accede to plaintiff's request that the general question be asked whether any of the jurors were stockholders "in any traction or steam railroad company". The appellate court here observed that the court below had erred in considering the question as directed as a private affair of the jurors, and further:

> "Presumably the information was desired for the proper purpose of testing the qualifications and admissibility of the jurors, to enable an intelligent exercise of the right of at least peremptory challenge."

In the second[61] of these instructive cases, handed down last July, the Circuit Court of Appeals for the same (Sixth) circuit indicated that a "misapprehension as to practice" upon the *voir dire* examination of jurors would have been fatal to the conviction below of violation of the National Prohibition Act, had it properly been saved. The higher court asserted that a question whether any member of the jury was a member of or contributed to any organization for the purpose of enforcing the prohibition law was clearly proper as materializing defendant's "right . . . to get information aiding him to determine whether he wished to make a peremptory challenge", irrespective of the fact that an affirmative answer to it, without more, would not disclose legal basis for challenge for cause.[62] "We must regard such information as this," the court observed, *"as within that minimum which respondent is entitled to have as the basis of a peremptory challenge"*.

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60 Armborst v. Cincinnati Traction Co., n. 3, *supra*. In Eppinger & Russell Co. v. Sheehy, 24 F. (2d) 153, (C. C. A. 5th, February, 1928) the principle involved here was discussed thoroughly. A question put by plaintiff's counsel whether any of the panel "were engaged in the casualty insurance business" was held on appeal to have been properly allowed to determine interest by reason of business relations, the court supporting this holding somewhat novelly as follows: "If in the particular case there is no surety upon which the burden of liability would fall, it is easy enough for the defendant, who alone has actual knowledge of the fact to prove, and thereby avoid any possible injury or prejudice."

61 Beatty v. United States, n. 3, *supra*. The defect here in defendant's saving of exception was that it was not specifically made, in that there had been a general objection and exception to a general refusal to put six questions, some of which admittedly were good.

62 See *supra*, n. 46.

IN CONCLUSION

From our previous study of the English practice and precedents[63] we have seen that traditionally there has persisted a strong presumption as to the impartiality of jurors ever since that turning point in legal history whereat they ceased to be accusatory witnesses called for actual knowledge of the matter in controversy and became discriminatory judges of the facts at issue. We have further seen that so far as the dictates of due process go under the common law, a party has no right to question jurors upon *voir dire* examination after they are empanelled but before they are sworn as jurors to try the particular cause at issue, unless he shall first have stated in good faith the ground of his challenge and thereby restricted the scope of his questioning.

It is obviously true that such a requirement has presupposed—in the absence of an entrenched confidence in the innate fairmindedness of the average juror—a knowledge gained of the venireman previous to his appearance in court upon the panel. But shifting times have removed the basis for such supposition. From the earlier condition of men in which each was well acquainted with his neighbor or was able through means immediately available to inform himself sufficiently about him, there has come about a radical change incident to the thickening population of our industrial era. The tendency now is to choose one's friends and even acquaintances widely and with general disregard for one's more immediate neighbors. Urban men and women generally know but little about those living about them; and their own reputations in the communities in which they live are largely indefinite. This change in the times has naturally impinged upon the courts. From their original position as community forums and recreational centers in which judge, counsel, jurors and onlookers knew each other, they have swung into position quite generally as cogs in a social state of growing complexity. Those who take part in their proceedings do so impersonally. They meet and part probably never to meet again.

Cut off politically from the older English tradition and confronted with differences in social conditions growing largely out of heterogeneity of population and extent of territories, it is therefore not surprising that our courts have

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63 "*Voir Dire Examination of Jurors*: *I. The English Practice*," n. 7, 34 and 40, *supra*.

countenanced such changes in jury trials as enable parties to procure information about jurors without being put to the expense and inequality of *extra-curia* investigations. The view now generally prevails in this country that a party may examine prospective jurors without having any knowledge previously obtained concerning them. And this concession, being comparatively new, has been generating a distinct element of procedural law around the question inevitable to it, viz., How far may such *voir dire* be extended as of right to parties in materializing the fundamental guaranty to trial by impartial jurors?

What are to be considered as essential to a *voir dire* examination of jurors today? We ask, for experience has demonstrated that upon occasion reasonable limits must be put upon such examination lest it degenerate unto pointless duplications and interrogatory quibblings valueless in the face of the salient issues of the case on trial.

Under the Constitution of the United States trial by jury in the federal courts is secured in criminal prosecutions and in all but the petty civil suits at common law. The jury is an indispensible unit, for better or for worse, in the federal administration of justice, even as the same is more elaborately so in the states. The observer of courts in actual operation notes that in the greater percentage of cases *voir dire* examinations are almost entirely if not altogether waived by counsel. But justice delayed is justice denied and consequently the wide-spread demand for the simplification of procedure has—in the face of crowded and clutted dockets in many federal courts growing out of their enhanced jurisdiction—swept with it a movement looking to the reduction of *voir dire* examinations to their essentials. Such movement has behind it a well-placed confidence in the ability and high qualifications that characterize most judges of the federal bench, and the *motif* of justice that through dilatory tactics one should not be countenanced to delay or deny to others their own day in court.

The highly restrictive requirements of the common law holding parties to *voir dire* examination only upon definite cause stated as well as practice heretofore existing, and the weighty recommendation of the Conference of Senior Circuit Court Judges, pursuant to which rules following the recommendation have been upheld without exception wherever presented, established judicial examination of jurors beyond contravention in the courts of the United States. As we have determined from our examination of the cases, however, the courts themselves have wisely dif-

ferentiated between the validity of exclusive judicial examination and its sufficiency.

At the present time, due to incomplete reports and in particular to the almost total lack of treatment of any kind in the field by the highest court in the land, important guideposts are yet to be erected. Consequently there ought to be forthcoming from the Supreme Court of the United States an opinion treating upon the proper extent of such examinations. That court may well clarify conflicting doctrine by fixing as settled rule, one of the following views:

(1) The loosely considered *dictum* of one Court of Appeals, that a personal examination may be insisted upon by counsel should he make it clearly evident that such is necessary for the intelligent exercise of peremptory challenge;

(2) the implication from the decisions in other circuits, that there is not secured a right to put questions beyond those calculated to make out *legal cause* for challenge;

(3) the middle view, indicated but not decided upon as precedent, that the trial court may maintain in itself all examination for legal cause, and should itself put also such other questions as are shown to be necessary for the intelligent exercise of peremptory challenge.

The last-named, in the opinion of the present writer, is the view most soundly tenable in both theory and practice and may therefore be expected to prevail. And yet, meanwhile to seek to abide by the generality that *voir dire* examinations are solely at the sound discretion of the trial judge is to follow the obscure. Under our jurisprudence there can be no accuracy of decision unless there be illuminating precedent, and consequently until our highest court has spoken we may have a continuation of variant views from the different circuits.

THE AMERICAN LAW INSTITUTE TO DATE

HERBERT F. GOODRICH*

A little more than five years ago the American Law Institute was founded at an organization meeting in the city of Washington. Many able men, high in their profession at the bar, on the bench, in the law schools, discussed ways and means by which the law could be improved. From the bewildering confusion of ever increasing precedents could sound principles be formulated, and clarity and certainty be brought to the law? The answer was an enthusiastic affirmative. Fundamental principles could and would be made clear and plain. With principles set out and applications to the present noted, the way of future development would be indicated but not constrained. There would be plenty of room for growth, but the growth would be in orderly process from points already reached.

Such was the hope of the founders of the Institute. The method by which the plan could be put in operation was soon devised. In the various branches of the law an expert was to be chosen who should be responsible for the statement of the law in his subject. He should be assisted and advised by a committee of learning and experience in the same field. But this statement of the law should not be a one man affair, nor even a committee affair. Lawyers in the membership of the Institute and members of the profession generally throughout the country should be asked to examine the work while it is still in tentative form, and to give their suggestions for its improvement. The purpose was to make an accurate statement of the common law as it exists today and to have the statement represent the consensus of the best thought and legal opinion of the entire profession. With this plan in mind the work of restating the law began. William Draper Lewis, formerly dean of the law school of the University of Pennsylvania, left the class room and became director of the new work. Initial subjects were chosen for restatement and some of the nation's most distinguished legal scholars were given the task of beginning the great work of improving the law. Agency, Contracts, Conflict of Laws and Torts were the subjects selected and responsibility for the restatement was given, respectively, to

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Professors Mechem of Chicago, Williston, and Beale, of Harvard, and Bohlen of Pennsylvania. The work was under way.

Progress was slow at first. No one had ever attempted just this kind of thing before, and both the nature of the finished product and the technique of its making had to be settled by experiment. The latter question was settled by experience. The first, which involved the form in which the restatement was to appear, has been the subject of a great deal of consideration. The form finally worked out is something similar to Dicey's well known English book on the Conflict of Laws. A statement of a general principle of law is made in black letter text. This is followed by a comment, explaining the principle there stated. The comment in turn is followed by an illustration applying the principle to a concrete set of facts. Obviously no decisions are cited. The restatement is based on consideration of the cases generally but there is no desire to produce another legal encyclopedia. The following section, taken at random from the Restatement on Contracts is typical of the form followed:

"Section 101. Sealed Promise May Be Delivered Unconditionally or in Escrow.

A promise under seal may be delivered by the promisor unconditionally, in which case there is a present contract under seal; or may be delivered in escrow, in which case there is no present contract under seal. Delivery may be made either unconditionally or in escrow to the promisee or to any other person.

COMMENT:

a. This Section by its terms is applicable to the power of a promisor to subject himself to an obligation. It does not enable a promisor by inserting in a document not only his own promise, but what purports to be a promise by the promisee, to subject the latter to an obligation by delivering the document to a third person. If, however, a promisor attempts this, his own promise is likewise ineffective until the promisee by accepting the document assents to assume the stated obligation. (See Sections 105, 107.)

ILLUSTRATION:

1. A delivers to B a sealed promise naming C as promisee. Though C is ignorant of the existence of the promise there is a present contract if the delivery was unconditional, a delivery in escrow if the delivery was conditional."

After five years of operation the work has reached the place where the institute can point to things accomplished, as well as to describing hopes and ambitions for the fu-

ture. The five years is an excellent record of fine work. It could not have been made without the tireless and carefully administered direction of Mr. Lewis, the continued interest and sound judgment of Mr. Root, the devoted and intelligent service of Mr. Wickersham, and likewise of the members of the council, and the faithful and continuous labor of the reporters and advisory committees. All these, plus the help and enthusiastic interest of the profession generally, have combined to make the first five years of work a certain prediction of further success.

The various items of accomplishments are worth separate mention. In the first place, a part of the Restatement of Contracts is now completed in final form.

This volume, just off the press, covers seven chapters of contract law. It deals with the formation of contracts, both formal and informal, joint and several agreements, rights of third parties, and questions of assignment of rights and delegation of duties. The material covered by this restatement has been constantly under consideration by Professor Williston and his group of advisers since it was first written in tentative form. It has, all of it, been twice before the members of the institute in general meeting; once in portions in the tentative drafts, later in proposed final form. It was made the subject of extended consideration at a meeting of co-operative committees of various bar associations held in Chicago a year ago. Since its consideration by the members at the meeting of the institute in Washington last May, it has been further examined and improved by the council of the institute, and Professor Williston and his advisers.

This piece of work in contracts is a representative sample of the product as a whole. The modus operandi of writing the restatement, and some of the interesting problems involved are described by Professor Arthur L. Corbin, of the Yale Law School, in the November and December, (1928) numbers of the American Bar Association Journal. Professor Corbin has been a member of the advisory group in contracts since the beginning of the work. The method he outlines for contracts is the procedure followed in other subjects where restatement is in progress. It need not be set out in detail here.[1] It is sufficient to say that the re-

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1 The plan of work of the Institute is described in the following articles: "The Institute's Restatement and the Michigan Law", 26 Michigan Law Review, 153-172. December, 1927. "Clearing Up The Law", Kiwanis Magazine, March, 1928. "The Work of the American Law Institute", The Annals of the American Academy of Political and Social Science. Volume 136.

statement of the other branches of the law is being done with the same painstaking care as that which has marked the work done in Contract Law.

The work in contracts has not been limited to that which appears in the part covered by the final draft just described. Members of the institute at the 1928 meeting considered tentative drafts of material covering Chapter 8, on the Statute of Frauds, and Chapter 9, on the Scope and Meaning of Contracts, including such problems as interpretation and the difficult parol evidence rule. Professor Williston and his committee are, at this writing, meeting with Director Lewis and working over preliminary drafts of material covering breach of contract and remedies and the highly intricate problems grouped under the general term "conditions".

While it is only in the field of contracts that a restatement has been published in final form, progress in the other branches of the law is equally gratifying. In Conflicts of Laws,[2] Professor Beale and his committee have submitted a tentative draft of the law covering a portion of the subject at each annual meeting since 1925. They meet in November for what is hoped will be the last conference on the preliminary draft of the final chapters. These deal with the Conflict of Laws of the subject of procedure and the very difficult problems of the administration of estates. The material has already been discussed at three meetings of the committee. It is hoped that the last of the Restatement of Conflict of Laws can be submitted in tentative form to the meeting of the membership of the institute and to the bar generally in 1929. If that can be done the remaining task will be the revision of the entire restatement with the help of such suggestions for improvement as have been and may be offered.

In Torts, Professor Bohlen and his advisory committee have worked through the topics of intentional injuries to the person, including the time-honored trio of Assault, Battery and False Imprisonment, and the defenses thereto. This material, in tentative form, has already been submitted at previous annual meetings for consideration and suggestions for improvement. For more than a year now

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March, 1928. An interesting summary of the work called "The American Law Institute; a Short Account" by Wm. Draper Lewis, Director, may be had upon application to the office of the Institute at 3400 Chestnut Street, Philadelphia.

2 The Restatement of Conflict of Laws and problems involved therein were discussed by the writer in the American Bar Association Journal for June and July, 1928.

Professor Bohlen and his group have been working in the field covered by the broad term Negligence. Portions of the results of that work have been submitted to the council of the institute, for approval by that body and presentation to the membership.

The Agency Restatement under the guidance of Professor Mechem has covered a large portion of that subject. Its work, already submitted in the form of tentative drafts to the institute, covers nine chapters and 368 black letter sections.

Director Lewis, along with his task of chief administrative officer, has found time to prepare a draft of a portion of the law of Business Associations. Covering forty-one sections and dealing with the Creation of Shares, it was submitted for discussion at the 1928 meeting of the membership of the institute.

In addition to the subjects already mentioned, the work of restatement has recently been enlarged by the addition of two more. Professor Harry A. Bigelow, of the University of Chicago, has been chosen to head the task of restating the Law of Property. He and his group of advisers have already held several conferences. The subject of Trusts has also been undertaken, and Professor Austin W. Scott placed in charge of its restatement. Tentative drafts of portions of the law concerning property will appear in time for the annual meeting of the institute in the spring of 1929.

Along with the restatement of the common law by the institute has gone the work in a model code of Criminal Procedure. A record of the accomplishments to date without a description of this important project would be woefully incomplete. A clear distinction should be kept in mind between the restatement of the common law and the drafting of this code. Restatement is in no sense a scheme for codification. The whole aim is to make a clear, reliable, and exact statement of the principles of the common law as it now exists, on which lawyers and judges may rely without the burdensome search through the mass of decisions upon which such statements are based. No legislature has been nor will be asked to give the force of statute to the principles there set forth. The restatement stands on its own merits as a scientific exposition of existing principles of law.

The Code of Criminal Procedure is a project of a different nature. Out of the dissatisfaction with the administration of criminal justice, both popular and professional, came

the idea that a modern code should be drafted of which a legislative body could avail itself, in whole or in part, if there was need for legislative action in a particular state. The institute was requested to undertake the drafting of such a code, and a separate gift was made to it to provide funds for carrying on the work. It has been in charge of Dean William E. Mikell and Professor Edwin R. Keedy, assisted by a group of law teachers, judges, and practicing lawyers experienced in the administration of the criminal law. Chapters covering Arrest, Preliminary Examination, Bail, Methods of Prosecution, Grand Jury, and Indictment and Information have already been presented for consideration. Since last spring the reporters and the advisory committee have held several meetings and worked over, in preliminary form, a large quantity of additional material. This covers problems of Jurisdiction, Venue, Change of Venue, Waiver of Jury Trial, Arraignment, Pleas, Motions before Trial, and Challenges. The work cannot be hurried if it is to be well done, but every effort is being made to push it to completion as rapidly as possible. During the winter the reporters and members of the advisory committee will contribute a series of short papers on problems met with in the various divisions of the code. These will appear in the American Bar Association Journal.

A list of the various tentative drafts of restatements and the criminal Code appeared in the July, 1928, number of the American Bar Association Journal, page 414. In addition to this there is now available the new draft of Contracts. It is priced at $2.50. The institute is not in the book-publishing business, but it will supply any of the drafts to persons interested at the prices listed, which covers just about the cost of printing and handling. They may be had at the office of the institute, 3400 Chestnut Street, Philadelphia.

STATE ANNOTATIONS

A very valuable aid to the work of the institute has been furnished by the generous co-operation of the committees appointed from the various state and local bar associations. These committeemen have shown great interest. They have made valuable suggestions for improvement of the restatements and they have been a very important factor in spreading knowledge of an increasing interest in the institute's work among the members of their associations.

Officers of the institute and committees from a number of these state and city bar associations met in conference in Chicago in the fall of 1927. Among things discussed at that meeting were ways and means for making the restatements of greatest usefulness in the everyday work of the lawyer and judge. In considering this topic, representatives of the Michigan State Bar Association presented what has been called the "Michigan plan" of local annotations of the restatements. It should be said that this "Michigan plan" has since become so generally adopted that the term is hardly accurate.

This plan proceeded upon the premise that a general statement of the law, such as the restatement, no matter how clear and accurate, is not of greatest usefulness to the lawyer unless it is accompanied by something to show him what his own court, or his own legislature, has declared upon the point. Either in presenting a case to a court, or in advising a client, it was said, the lawyer needed to be informed of his local decisions and statutes as well as the general rule of law. If the restatement could furnish this information, it was urged, it would make it greatly more valuable in every day use. But such a task was not one which the institute could undertake to perform; its undertaking was already enormous enough.

It was proposed to bridge the gap by work done under the auspices of the State Association. Michigan decisions and statutes were to be searched out, carefully examined and summarized, and the effect of all local authority indicated under each section of the restatement. The experiment was being undertaken in the subject of Conflict of Laws, and a copy of the Michigan annotated restatement of that subject was to be sent to all members of the Michigan Association.

This proposal was discussed by those present. After thorough consideration, a resolution was passed, commending the experiment of local annotations to the various bar organizations. During 1928 a great deal of work has been done along this line by interested associations and committees.[3] The Michigan committee completed the work on the first three parts of the restatement of Conflict of Laws and has distributed the volumes to members of the Michigan State Bar Association. The Pennsylvania committee has published local annotations on the first part of Conflict of Laws, and has ready a collection of material on Contracts.

3 A full discussion of local annotation work may be found in a paper in the October, 1928, number of the American Bar Association Journal. pp. 538-541.

This has awaited the publication of the institute's official draft. In New York the faculty of Cornell Law School has co-operated with the Bar Association committee on Contracts, and the results of the work will appear in printed form this winter. Work in the Illinois decisions has been in progress for several months under the direction of the Bar Association Committee and the secretary of the committee, Mr. R. Allan Stephens. Co-operation between the law schools of the state and the bar associations is producing fine progress in several states. In Nebraska, Oregon, Connecticut, North Carolina, West Virginia, Mississippi and Texas work is proceeding in this way. Much in the way of tangible accomplishment may be confidently expected in the next few months.

CO-OPERATION IN THE PROFESSION

The short five years of institute work have brought about co-operation among the various branches of the legal profession in a truly remarkable way. Judges, law teachers and practicing lawyers have joined forces in a thoroughly earnest effort to improve the law. The co-operation is not limited to those who are members of the institute. As a working body it must necessarily be confined to a membership of a few hundred persons. But interest in its work, and aid in its successful accomplishment have come from organizations and individuals throughout the land. That such an effort will result in the improvement of the law there is no room for doubt.

THE COMMON LAW'S DEBT TO ANNOTATIONS*

By George F. Longsdorf
of the California Bar

Against the many acknowledged virtues of the common-law system of law deduced from reported precedent, virtues such as adaptability, flexibility, and capacity for self-development and growth, have continually been set the alleged demerits that it was unscientific, that is was crude and formless, that it was too slow in its responses to new conditions. The facts that in all important English-speaking communities, the common law, with its system of precedents, furnishes the basis of all law; that it has there survived the test of use and experience; that the essential justice in the English and American laws is surpassed by no other system and approached by few other nations—ought to persuade one that the common law is thoroughly systematic and scientific; because an unsystematic and unscientific system could not probably produce the very qualities wherein it excels. If it were the sole product of judges legislating under the guise of deciding, and if the labors of the judges were left untouched to serve as the final contribution to the evidences of the unwritten law, chaos, delay, and uncertainty might be expected as the result; but the common law has never been a purely judicial product, however true it may be that the cases have been such. For, to use a common quotation, "*the law is in the cases, but the cases are not the law*". Therefore, to know and state the law requires a post-judicial operation, just as it required the office of lawyers to evoke the decision which contains the law.

Three classes of lawyers, then, have made the common law—the advocates, the judges, and the writers—and each one of these classes has played a vital and an indispensable part. The advocate has presented the question, the court has decided, and the writer has recorded and expounded the precedent, each limited to the particular occasion and duty. Because of that limitation their correlative tendency has been to keep each other's operations true, and their

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* Reprinted from Volume 20, Case and Comment.

combined skill has solved many problems that no *a priori* system of laws or codes could have coped with.

Now the reason that the system of precedents has not produced an unscientific and chaotic law, and that the law has not been overwhelmed in mere numbers of precedents of widely varying worth and authority, is because it was the special business of the writers to deal with and prevent those particular tendencies. From the beginning they have done that work by devising methods and forms of books suitable to the needs of their times. They have so far done it well, and so long as "man can do what man has done", we may expect them to do it well.

Of the writers there are three prime classes, *viz.,* the reporters, the digesters, and the commentators whose work is now principally done by the annotators. None of these classes is very distinct, though their functions cleave sharply. Ofttimes the work of performing two or more of these functions, such as reporting and annotating, has been done by one writer and published in the same book or set of books. Often, if not usually in the present day, such work is done by a highly organized and co-ordained staff of writers, for in no other way can the mass of current and past decisions be managed.

The work of the reporter and that of the digester of cases is familiar, and the forms in which their work appears in print are not greatly various. They need no testimonial or any introduction to a profession that has known them both by name for hundreds of years. *But the commentator and his modern progeny, the annotator, is a writer of many degrees and differences.* His work and methods have been forced through many developments, and undergone many changes. *Some have taken the name of annotator who were not worthy, while there are "commentaries" and treatises that are really nothing but digests.* There are real commentaries nevertheless in this day, such as the Criminal Law Treatises of Wharton, Wigmore's Evidence, and Labatt's Master and Servant, and others equally well known. We can pass from all these to the annotators, for this is frankly a special plea in their behalf. They are now doing what may, perhaps, be as great a work for the common law as ever has been done, and that is the rectification and harmonizing of it into uniformity and systematic accuracy.

For several centuries in the history of the common law the need for such work was amply supplied by the great commentatorial and institutional works of Coke, Hale,

Blackstone, and Kent, and the special treatises contemporary with them. Precedents were not numerous then as compared to now, and the office of the writer was as much to suggest the undeveloped doctrine for which no precedent existed as it was to reconcile and elucidate. Nevertheless there were annotators in those days worthy of the name. Occasionally they combined annotating and reporting, of which Sergeant Williams' notes to Saunders' reports may be noted as an example. His note to Pordage vs. Cole, 1 Wms.' Saund. 319, 18 Eng. Rul. Cas. 601, on Mutual Covenants in Contracts, is cited specially scores of times in the later books of reports, and may be said to have established for the law a systematic conception and analysis of that difficult subject. Very much of the work in Coke's Reports is essentially annotation. It does not avow that character by a typographical arrangement separate from the report of the case, as we do now. Indeed it is run into the body of the opinion, and at most is distinguished by the words, "But note reader that," etc., with which Coke was wont to introduce his own observations. Nevertheless it is annotation, and though Coke was sometimes criticized for it, as in the words of Lord Holt, who accused him of "improving" the reports (see Coggs vs. Bernard, 2 Ld. Raym. 909, 5 Eng. Rul. Cas. 247, at 252), yet time has vindicated the work of Coke, and left such criticisms of bookish rather than practical interest. One eminent work of annotation, known well to all the old lawyers, was that in Smith's Leading Cases (vol. 1, 8th ed. p. 199), the forerunner of the great set of selected cases of this day with their elaborate and exhaustive annotations.

It is because of the great augmentation in the number of reported cases, due largely to the multiplication of separate jurisdictions in the United States, that today's problem for the special labors of the annotator has existed. When jurisdictions were few, and precedents not numerous, the practitioner and the judge were able and had the time to thread the reason and principles of the law through the cases well enough without the help of a modern annotation. There were not multitudes of subtly applied illustrations of general principle to minutely variant facts. Instead of fifty there were a dozen jurisdictions, perhaps, to diverge from uniformity of doctrine and furnish confusion of authority, or, which was just as bad, the appearance of confusion. There were few of the anomalous or exotic doctrines such as the water laws, the mining laws, or the adapted civil-law institutions, which the western

and southwestern states brought into the body of American law and the over-sea colonies into the body of the English law. Up to that time the practice of a careful lawyer was to read all the decisions of his own state as they were handed down, and it was not a great task to do it.

Almost contemporaneous with the great augmentation of cases, in fact one of its consequences, began the development of the modern digest or cyclopedia. While these were necessary and invaluable contributions to legal literature, and by no means to be disparaged by any comparison, they did have the effect to reveal to the every-day lawyer either "too many cases in point", or else by a distributive analysis that he did not follow they placed analogous and cognate cases in different topics, and he failed to find them. Either condition was unbearable, and, if the lawyer had been left to himself, irremediable. It began to be said that there were too many cases reported, too much authority, and some even wished for another Alexandrian burning of all the law books so that we might start anew. By poetic license the law was pictured as "a codeless myriad of precedents, a wilderness of single instances", which it never was and is not now. *Nothing was wrong but that the common law had been growing and had outgrown the older forms of law books.* The very same complaint was made by Justice Buller in 1786 (Birch vs. Wright, 1 T. R. 383, 15 Eng. Rul. Cas. 626), when he suggests "wading through all of the old books" to "find a great collection of cases" in Comyn's Digest. Two years later, in 1788, Tomlin's Repertorium Juridicum (Dublin, 1788) announced in its preface that a "vast accumulation of cases", amounting to 25,000 in forty years, necessitated an easy mode of reference to them, to-wit, what we would call an index digest. We have 25,000 cases each year to deal with, and do it with skill that Tomlin or Comyn never dreamed of.

The truth is that in an evolutionary system of law like ours, wherein we generalize from cases to doctrines, there cannot be too many cases. *The law is enriched, and not smothered, by its many cases.* But the generalizing must be done by careful and accurate method and with adequate expenditure of time, neither of which the lawyer can be expected to bring to such work. And so it has come to pass that, after the work of the great commentators, and in sequence the work of the digesters, has been done, need has developed the modern annotators and his methods. His work relieves the common law from the necessity of a Justinian or a Napoleon to recodify our law; for when a

"conflict of authorities" is rightly and patiently examined, and the cases explained in a good annotation, the conflict is often found to have been an appearance, and not a reality, or else the true and the fallacious are sifted so thoroughly that the lawyer as he reads is freed from doubt and vexation.

Such work as this that the annotator does cannot be done in a digest or a textbook, or by any other known method than annotation of some well-chosen case. See note on Rule in Shelley's Case, 29 L. R. A. (N. S.) 963, for example. There are thousands of trite and commonplace cases fit only to be *data* from which the law may be deduced, or perhaps only to be illustrations of long-settled and well-understood rules. They must be reported in some way, if only that time and the general judgment of lawyers may assign to them their true value among the precedents of the law. On such cases annotation is too valuable to be wasted. *They present nothing that requires more than the reporter and the digester can give,* until the time when the annotator shall need *to compare them with all the other trite or commonplace cases* in the production of some exhaustive and clarifying treatment of an important doctrine.

It is implied in the foregoing statements that the province of the annotator is chiefly within those departments of the law that are conflicting or vexatious, or full of varying minutiæ, or novel, requiring the aid of difficult analogies because direct precedents are lacking, but it is not meant to exclude another form of annotation; namely, that which collates the citations of earlier cases and so arranges them as to show the history and influence of each decision. These annotations, sometimes known as "extra annotations", trace judicial influences, while the others trace and co-ordinate doctrines and rules. They serve different and equally important purposes, though the critical annotation is of greater utility than the extra annotation, and requires more editorial skill in its preparation. Both classes of annotations, as distinguished from those so-called annotations which are merely collections of references, tend to harmonize and unify the common law of all the many jurisdictions, and in some degree to establish their general statutory law on a common basis of principle and reason. They do this by showing what the law is, and its reason, in the difficult and obscure parts which neither digest nor textbook professes to do. *Being narrow in its subject and intensive in its treatment, an annotation is specially de-*

signed to supply a process in the evolution of the law wherein all other forms of law books, "by reason of their universality, are deficient". They thus keep the common law of all English-speaking people a living and growing law, which neither breaks down into chaos under sheer numerical weight of precedents, nor is thrust aside for some petrifying code of substantive law; if uniform laws in all the states shall ever be generally enacted they will have been made possible largely by the years of sifting and settling that the patient labors of the annotators of today have given the precedents. Their contribution to the common law is in keeping it true and uniform in principle, in freeing it from multifariousness of illustration, in adapting it by analogies to new conditions. That common law, which we believe to be the most excellent of systems, has been kept for us by the writers in the law. Each class of writers has had its part. None has done more than the annotators, and by no other means than annotation could their part have been done.

FACT RESEARCH IN LAW ADMINISTRATION

By Charles E. Clark,
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INTRODUCTION

One of the most important recent developments in the field of the law is the greater emphasis now being placed upon the effect of legal rules as instruments of social control of much wider import than merely as determinants of narrow disputes between individual litigants. The ultimate results upon the community of the adoption of certain legal principles rather than others has been but imperfectly understood. Definite data have been lacking as to what business and social habits, practices and customs were actually in vogue and as to their interrelation with current legal rules. In default of such definite information, the courts have at times taken the opinion of experts, have at other times used supposedly learned authorities under the application of the doctrine of judicial notice, but have perhaps more often made deductions based upon their own experiences and beliefs. Such deductions are at best of somewhat questionable value, since they are necessarily based upon knowledge of a limited kind. Often, however, they seem distinctly harmful, for they tend to assume as settled fact something which is either unproven, or at times even presumptively untrue. The protests aroused by some of the judicial opinions on the constitutionality of humanitarian legislation indicate a modern attitude in its refusal to accept as final the dictum of a court on disputed social questions. Judges themselves who have probed the manner and method of judicial decisions have expressed similar questionings. Some of the law schools are making definite overtures in the direction of the social scientists in the hope of help from that quarter. In fact, this need as felt in the law for more adequate social data as to the administration of justice is but part of a general movement in the social sciences to substitute for the vague generalizations of the older economists and philosophers concrete information based on adequate statistical information. To a certain extent it has its counterpart in modern business,

which no longer expects to operate successfully without adequate information of its operations through modern cost accounting and statistical systems.

In spite of this need for more and better information, very little actual research has been attempted by lawyers or law schools. The task is extraordinarily difficult. No adequate technique for it has been developed. Just what is to be examined or how is not clear. In a few quarters an attempt at experimentation is now under way. This paper is a description of one such plan of investigation in the actual operation of our trial courts as shown by the files and records of the cases considered by them.

RESEARCH IN THE FIELD OF COMPLETED COURT CASES

It is believed, and experience so far shows, that this, although almost a virgin field to the social scientist, is one of the most fruitful for this type of investigation. Here are the actual records of the daily and yearly grist of cases passed on by the courts. They are case documents concerning details of some of the most vital problems affecting the lives of the participants; records automatically brought forward by the ordinary court processes and in no way selected or colored by the predilictions of the investigator.

These records are capable of use for at least two important purposes. They may be used to illustrate and to test the efficacy of our rules of procedure and our general methods of administering justice. And they may be used, second, as starting points for the further detail investigation of social problems of many and varied kinds. Thus in the material described below there is information of value on both points. It will be seen that there is material bearing upon the efficacy of trial by jury, indicating for example that in such trials the defendant appears to have a much greater chance of success, and that appeals are, relatively speaking, many times more numerous than in trials to the court. The effect of the harsh remedy of attachment, whereby the defendant's property may be taken at the beginning of the suit to be held to answer to an ultimate judgment, if granted, is brought out apparently justifying the inference that excessive attachments are not unusual. The delays consequent upon the trial of a litigated case, and the limited usefulness of demurrers, motions to correct, and other familiar pleading instrumentalities are also suggested.

In addition to this type of data, we find figures of great importance to students of the divorce problem. In the jurisdiction studied, divorce is not thought to be easily obtainable. The judges take the position, which is well settled in their jurisprudence, that the state is interested in conserving the marriage relation and it is their duty to protect the interests of the state in this regard. Yet we see that out of 1554 uncontested divorces going to final judgment in the period considered, the decree was denied in only 28 cases. In spite of the stated rule of law, divorce seems actually obtainable, in cases not contested by the other party but pressed to judgment, over ninety-eight times out of a possible one hundred. Where the defendant contests the case, the ratio, of course, changes, but even there the chances of success are over three out of four, (266 granted, 84 denied).

Again in the case of negligence actions involving traffic —the automobile injury cases—we find a large number (1352) of cases brought compared to the total of all litigation; about one-quarter, if the uncontested divorce and foreclosure and change of name cases are excluded (5350). Of these cases, however, 887 are withdrawn or settled by stipulation and 231 are discontinued or defaulted. Almost 85 per cent of these cases would, therefore, seem to be cases where the parties use the court machinery to spar for position in order to effect a compromise. Again the large proportion of contract and foreclosure cases (1270, 1443; total 2713) so many disposed of without a contested trial (at least 2511) indicate the important function of the court as a debt collecting agency. This might present the question whether for the somewhat limited requirements of this class of cases the court processes are the most effective and the least expensive possible. For example there might be suggested a consideration of the desirability of enacting the Uniform Mortgage Act (recommended by the Commissioners on Uniform State Laws last year) whereby foreclosure by the court, or court action in foreclosure cases, is not necessary unless required by one of the parties.

To the investigators a part of the fascination of the work has been the many uses to which the information may be adapted. New possibilities are constantly occurring. We should be glad of any suggestions along these lines from readers of these pages.

AN EXPERIMENT IN SUCH RESEARCH

The investigation here described is one undertaken by the Yale Law School at the beginning of the school year 1927-28 as a part of a program of research in the field of law administration. It was made possible through the interest of President Angell and the Yale Corporation, by whom four research assistants were added to the staff of the school. These people have been carrying on the investigation under the direction of a committee of the faculty.[1] The work has already brought forth much favorable comment. In view of this and of the valuable information already secured after only five months' work, the following report is presented, even though it must necessarily be incomplete and partial only. It represents the figures compiled and classified up to March 1st, 1928.

The inauguration and initial development of the work was exceedingly difficult. We found nothing in the way of a guide and were therefore forced to work out our own plans and methods. In fact we know of no exactly similar project, covering civil causes. We desired to perfect a plan which would permit of the comparison of the course of law administration in different states and jurisdictions, even in different countries, if means of continuing the project should be available. So a large part of the time has been spent in organizing a system of procedure, in developing work sheets, and in planning tables to picture the results obtained. By the end of this school year, however, statistics will have been gathered covering the civil cases tried in the Superior Courts and Courts of Common Pleas, both general trial courts, and some of the City Courts, of Connecticut, over a two year period. These will not, however, be classified and available for publication until next fall.

THE FIELD COVERED BY THE PRESENT STATISTICS

The figures referred to hereinafter cover all the cases completed by final judgment, withdrawal or discontinuance, or in any manner, during the years 1925 and 1926 in the Superior Courts of new Haven County (at New Haven and Waterbury) and Fairfield County, and for one year only

1 The research assistants are Miss Ruth A. Yerion, Mr. J. Joseph Smith, Mr. Aaron Nassau and Mr. Warner B. Fuller. The faculty committee is composed of Professors Green, Dodd and Hutchins, with the writer as chairman.

for Hartford County.[2] The superior courts have jurisdiction of all cases in law and equity where the amount in demand is $500 or more, and of various special matters, such as divorce and matrimonial litigation, appeals from probate, from the Workmen's Compensation Commissioner and from city boards and other administrative bodies, and so on. As to ordinary cases in law and equity, they have concurrent jurisdiction in the counties named with courts of common pleas where the matter in demand does not exceed $2,000. Beyond this their jurisdiction is exclusive (except in Waterbury where the Court of Common Pleas has unlimited jurisdiction). The counties covered are the most populous in the state, numbering according to the census of 1920, 1,072,177 people out of a total population of the state of 1,380,631. Included therein are the larger cities of New Haven, Bridgeport, Hartford, Waterbury, New Britain, Meriden and Stamford. It is a highly industrialized district including many world famous factories, and, in Hartford, some of the greatest insurance companies.

In addition the figures cover the Federal District Court for the District of Connecticut for a period of three years. Here comparison with the State courts is somewhat difficult, due to the complexities of many of the federal cases, and the comparatively few cases of a type similar to those considered in the State courts. It would seem, however, that the comparatively simple code procedure of Connecticut has not, however, been successfully transferred to the federal court, even in actions at law where the Conformity Act should govern.

DIFFICULTIES OCCASIONED BY THE COURT FILING SYSTEMS

The difficulties of investigation were greatly increased by the diversities in keeping the court records found in the various clerk's offices. The present figures were collected from the offices of four different clerks, where there were in effect four different systems. This is the more striking since only a single court is involved, and, because of the fact that the superior court judges go on circuit duty about the State, a court where the judges are interchanged. The difficulties were accentuated by the use in all the offices of a filing system with the papers folded, and tied with a

2 Due to divergencies in the methods of keeping records followed by the clerks of courts, the year covered in Hartford County is September, 1925 to September, 1926. The addition of another year in that county will add between 1500 and 1600 more cases but will not appreciably change the relative figures.

ribbon where numerous, instead of the modern flat filing system. But some file their cases according to the year when completed, some according to the original numbers of the case, some according to the manner of termination of the case, and so on. A few comparatively simple changes resulting in a uniform system would reduce the labor of collecting data of this kind very much. We found the clerks uniformly courteous and helpful and greatly interested in the work. Many work under great difficulties of space and equipment. They would undoubtedly be relieved by the installation of improved and uniform filing systems.

It is surprising that so few official statistics are required by the state itself. It is an indication that practices which other businesses find indispensable have yet to make themselves fully felt in governmental business. In view of the interest of the clerks in the investigation, it may be hoped that means may be found of providing for such reports.

A GENERAL VIEW OF THE LITIGATION

Table "A" herewith gives the cases reaching final termination during the period investigated together with the manner of their disposition. [Table "A" herein referred to is printed on pages 330 and 331.]

TABLE "A"

CASES TRIED AND DISPOSITION

Superior Courts of Connecticut for New Haven County at New Haven and Waterbury, Fairfield County at Bridgeport for the years 1925-1926, and Hartford County at Hartford for the year 1926.

TYPE OF ACTION	No. of Cases Bro't	No. of Judgments for Plff.	No. of Judgments for Def.	No. of Cases Withdrawn	No. of Cases Discontinued	No. of Cases Defaulted	No. of Stipulations for Judgment	No. Where Amount Recovered $2000 or Less	No. Where Amount Recovered over $2000	No. of Cases Where Jury Claimed	No. of Cases Where Jury Had	No. of Cases Appealed
Divorce Uncontested	2016	1526	28	121	341	0	0	0	0	0	0	0
Divorce Contested	478	266	84	48	80	0	0	0	0	0	0	2
Negligence Traffic	1325	197	88	828	212	19	59	117	74	794	141	43
Negligence Non-Traffic	279	35	48	136	60	1	11	22	7	147	38	18
Foreclosure Uncontested	1263	911	1	171	180	0	121	0	0	5	1	0
Foreclosure Contested	180	98	3	46	33	0	22	0	1	2	0	6
Contract, Breach and Debt	1270	327	58	432	453	117	63	162	141	191	47	41
Contract, Specific Performance	68	10	9	24	25	0	0	0	0	2	0	4
Real Property, Equitable Remedy and Injunction	489	272	16	96	105	59	13	6	6	28	0	14
Real Property Other	46	8	5	13	20	0	0	5	1	10	3	4
Receivership, Corporation, Partnership and Accounting	99	57	2	18	22	1	0	3	0	3	0	1

Appeal—Probate	121	18	17	64	22	0	5	1	1	42	10	2
Appeal, Compensation Comm'r.	97	13	38	23	23	1	1	0	0	0	0	20
Appeal, Other Tribunals	174	36	9	102	27	0	32	1	0	0	0	4
Annulment of Marriage	44	22	8	5	9	7	0	0	0	0	0	0
Alienation of Affections	43	1	4	22	16	0	0	0	1	11	1	0
Support	45	7	1	10	27	2	1	0	1	0	0	0
Breach of Promise	11	3	0	6	2	0	0	4	0	11	7	0
Fraud	76	10	8	33	25	0	1	2	3	24	7	7
Mandamus and Special Proceedings	61	19	17	3	22	0	0	0	0	0	0	6
Name—Change of	110	101	3	0	6	0	0	0	0	0	0	0
Assault, Battery, etc.	90	18	11	21	40	2	2	12	5	38	11	1
Slander and Libel	55	3	4	23	25	0	0	3	1	20	6	3
Personal Property Replevin and Conversion	85	16	4	38	27	4	5	5	2	11	0	2
Construction of Wills	17	15	1	0	1	1	2	0	0	0	0	8
Declaratory Judgment	17	9	3	3	2	0	0	0	0	1	0	0
Miscellaneous	186	49	23	36	78	0	9	4	8	10	1	8
Totals	8745	4047	413	2322	1883	214	347	347	252	1350	273	194

Some explanation of the table may be made. The division into types of action is, of course, arbitrarily made by the investigators, since forms of action have been abolished. Divisions along other lines were possible but these were settled on, at least temporarily, as the most suggestive. The uncontested divorces are those where the defendant does not appear and file an answer. In many of the contested divorces—where an answer is filed—there is actually nothing more than a formal contest, or a dispute over other matters such as the custody of children, or a grant of alimony. The "negligence-traffic" cases include all cases for damages for injury to personal property arising on the highway, i. e. automobile and trolley car accident cases. The remaining negligence cases are included in the next subdivision. Uncontested foreclosures are those in which no answer is filed or the case is settled by stipulation. Even in the foreclosures listed as contested, the defense may often have been purely formal.

Nearly one-half the contract cases were brought under a statutory form of complaint known as the "common counts" and used only to recover debts or sums substantially liquidated. A large proportion of the remaining cases are likewise brought to recover debts. Probably over three-fourths of these contract cases are therefore collection cases.

The total number of cases brought does not include formal statements filed in the court and not furnishing any actual business, such as layouts of highways and certificates of dissolution of corporations. Nor does it include eight cases transferred to other courts. When cases of the additional year for Hartford County are added, the total cases will number over 10,000. The default judgments and the judgments by stipulation are also included in the judgments for plaintiffs. Deducting these leaves 3,486 judgments for plaintiffs. Adding to this the judgments for defendants and deducting the judgments in the uncontested divorce and foreclosure and change of name cases leaves 1,403 as a possible maximum of contested cases. On this basis judgments for plaintiffs in such cases number nearly three times the judgments for defendants.

The "withdrawn" cases are those terminated by a formal withdrawal; the discontinued cases are those ordered discontinued by the court. Each spring the docket is called by the presiding judge and cases more than one year old are discontinued unless it appears that they will furnish business for the court. Withdrawn cases are there-

fore for the most part cases settled by the parties; discontinued cases would include both cases settled where the formal withdrawal was not filed, and cases which the plaintiff failed to prosecute.

The comparatively small number of jury trials is referred to below. The number of appeals to the Supreme Court of Errors is perhaps not high (183 appeals; 11 reservations; 194). Sixty-one such appeals are in the negligence cases. The reservations are cases reserved for the advice of the Supreme Court on questions of law, without formal decision in the trial court.

LITIGATION IN THE FEDERAL COURT

A summary of the business in the federal court shows quite a different type of cases.

TABLE "AA"

CASES TRIED AND DISPOSITION; U. S. FEDERAL COURT FOR THE DISTRICT OF CONNECTICUT; JANUARY, 1925—DECEMBER, 1927

	No. of Cases	Judgments	Withdrawn	Discontinued
Law	90	28	56	6
Law (Forfeiture)	207	188	13	7
Law (Admirality)	66	28	35	3
Law (Habeas corpus)	14			
Law (Miscellaneous)	11			
Equity	30	15	15	
Equity (Patent)	57			
Equity (Receiverships)	43			
Equity (Naturalization)	58			

The above table covers a three year period. The largest group of cases is that of proceedings for forfeiture of property on behalf of the government. Of the 90 cases at law, 24 were negligence cases, 19 for breach of contract and 27 for debt or quasi-contract, including suits to recover overpaid taxes and suits by the government to recover on bonds. There were 18 judgments for plaintiffs and 10 judgments for defendants, 7 jury trials being had.

TIME CONSUMED IN DISPOSING OF LITIGATED CASES

The following table shows the length of time consumed by the various cases which went to judgment, before judgment was entered.

TABLE "B"

TIME TO JUDGMENT OF CASES IN THE SUPERIOR COURTS OF CONNECTICUT AS IN TABLE A

Type of Action	To 1 month	To 2 months	To 3 months	To 4 months	To 5 months	To 6 months	To 9 months	To 1 Year	To 1 1-2 Years	To 2 Years	To 3 Years	Over 3 Years
Divorce Uncontested	6	10	356	377	261	169	238	60	54	20	7	2
Foreclosures Uncontested	604	135	43	35	30	29	20	10	9	3	4	0
Change of Name	93	12	5	0	2	0	0	0	0	0	0	0
Contract	33	25	10	13	14	13	35	34	46	21	29	19
Negligence	13	12	16	29	19	20	62	35	67	22	15	14
All others	277	98	112	86	69	67	143	127	108	43	15	28
Totals	1026	292	542	540	395	298	498	266	284	109	70	63

The large number of uncontested foreclosures disposed of almost at once may be noted. With the uncontested divorce actions, many decrees are granted shortly after three months: this is explained by the rule that where notice is only by publication and the defendant does not appear, the case must remain on the docket for 90 days. The figures in the negligence cases are most illuminating, for these include some of the most contentious business. The large number of such cases disposed of from 6 to 18 months after action brought and the many after one year indicate that such amount of delay may be expected in many cases. (Uncontested foreclosures from Waterbury were not available for this table.)

Many cases are withdrawn during the first month or two after being returned to court. These indicate that compromise or settlement has been reached. Cases discontinued by the court on the other hand are by rule at least one year old; they may have been settled some time before, or it may be that the plaintiff has simply failed to press the case. Withdrawn and discontinued cases have, therefore, been omitted from this table.

Due to the few cases in the Federal Court, no definite conclusions as to the time consumed in litigation in that court are perhaps permissible. The cases in question seem to have taken a relatively longer time than as disclosed by the above table for the state courts.

THE USE OF THE JURY

The figures given above in Table A indicate that the jury is not excessively used in Connecticut. They indicate that the jury is claimed in about one-sixth (1,350) of the total cases brought and had in about one-fifth (273) of the cases where claimed (due presumably to the settlement or withdrawal of many cases). But in a great many of these cases a jury trial may not be had as of right. An estimate from the type of action of the number of cases brought where jury trial might have been claimed indicates a total of about 3,317 cases.

The following table indicates the use of the jury:

TABLE "C"

COMPARISON OF JURY AND COURT CASES GOING TO JUDGMENT, SUPERIOR COURTS OF CONNECTICUT, AS IN TABLE "A"

	Cases Tried	Judgments for Plaintiff	Judgments for Defendant	Appeals (Excluding Reservations)	Negligence Cases	Same, Judgments for Plaintiff	Same, Judgments for Defendant	Same, Appeals	Contract Cases	Same, Judgments for Plaintiff	Same, Judgments for Defendant	Same, Appeals
With Jury	232	137	95	61	157	94	63	34	37	24	13	16
Without Jury	1495	1139	356	122	173	105	68	24	252	209	43	22
Totals	1727	1276	451	183	330	199	131	58	289	233	56	38

Additional cases with jury (disagreements, new trials, withdrawals, etc.) 41; cases tried as above, 232; total, 273.

Cases tried in which jury trial might have been claimed, approximately 600.

The above figures are of value both as to the use made of the jury and as to its relative effectiveness. The item "Cases Tried" is exclusive of the uncontested divorce, foreclosure and change of name cases. The figures do not include judgments upon motion and hence vary somewhat from those in Table A. It appears, therefore, that jury trials are had in about 13 per cent of the cases and in about 38 per cent of such cases where they could have been claimed. Yet 27 per cent of the jury cases are appealed, as against slightly over 8 per cent of the court cases. Of the appeals in jury cases, 56 per cent are in the negligence cases. Judgments for defendants are given in approximately 41 per cent of the cases tried to the jury, as compared to 23 per cent in cases tried to the court; or if the additional figure of 41 disagreements, new trials, etc., is added, the results in the jury cases are judgments for plaintiffs, 50 per cent; for defendants, 35 per cent; disagreements, etc., 15 per cent.

From figures of the clerks we have learned that the actual jury trials were from two to three times as long, as the same number of court trials. The figures suggest, therefore, the more expensive and time consuming form of trial as leading to the less certain results; results more likely to be attacked on appeal.

The small number of jury trials and the large number of jury-waived cases is remarkable when compared with figures from a State like New York. Comparative figures would seem to indicate that rules of form as to the waiving of jury trial may affect the result to a very considerable extent. In Connecticut the English practice is followed that a jury trial is waived, unless affirmatively claimed in writing by one of the parties within a stated period. Inertia of counsel leads inevitably to a court trial. In New York perhaps the more usual rule in this country has been followed that a jury trial is not waived by an appearing party in general except by some affirmative act, such as a written waiver.[3] The jury case automatically goes on the jury calendar. But in the First Department in New York City the pressure of jury cases has been ever increasing. At the end of 1926 there were on the General Term Calendar nearly thirty thousand jury cases, an increase of nearly four thousand that year. The court was almost two years behind the calendar. These conditions did not obtain with respect to the court cases. When the Civil Practice Act was

3 The statutes are classified in a book on Code Pleading by the writer hereof to be published by the West Publishing Company in July, 1928.

adopted in 1920, there had been support for a change in the rule of jury waiver and it was recommended by the Board of Statutory Consolidation, authorized to recommend a new practice code. But the legislature did not adopt this recommendation. In 1927, however, upon report of the Special Calendar Committee in the First Department, it did change the law for New York and Bronx counties, so that since May 1, 1927 an affirmative demand for jury trial must be filed and served.[4] The calendar fee was also increased from $3.00 to $20.00 and a jury fee of $12.00, payable on making the claim, was imposed. The effect of this change is striking as shown by the following figures. During the year preceding May 1st, 1927, 20,282 causes were placed upon the calendar, all of which were entitled to trial by jury. During that period, 11,951 cases were disposed of by trial, settlement, dismissal, etc. Of these 3,925 were disposed of by actual trial or inquest and out of these only 174 were tried without a jury, the right being waived. From May 1st, 1927 to March 1st, 1928, 4,380 causes were added to the calendar, (a decrease of 11,092, or about 72 per cent from the corresponding period of the previous year). Of these 3,111 or approximately 71 per cent were cases of jury trial claimed by making the necessary affirmative demand and 1,269 or approximately 29 per cent of waiver by failure to do so.[5] Very likely this latter figure will be increased when the time of actual trial arrives. Further study of the operation of these rules in New York and Connecticut and elsewhere would seem to be profitable.

THE USE OF ATTACHMENTS

Connecticut is one of the few states where attachment of the property of the defendant, to answer to a claim money judgment, can be had practically as a matter of course at the institution of suit. Such attachment is made by a sheriff upon writ signed by a commissioner of the superior court. Since all attorneys at law are commissioners, in practice the attachment is ordered by the plaintiff's counsel in such amount as he sees fit. The only remedies of the defendant for an excessive or illegal attachment are

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4 See amendment of 1927 to N. Y. C. P. A. sec. 426; Report of the Special Calendar Committee appointed by the Appellate Division, Supreme Court, First Dept., made June 20, 1927.

5 We are indebted to Hon. Edwin M. Coe, Trial Term Calendar Clerk, for these figures. See also Hon. Charles H. Tuttle, Reforms in Federal Procedure, 14 A. B. A. Jour. 37, 41 (1928).

application to a judge for reduction or release of attachment and a possible claim for damages for malicious abuse of process where that can be proven. The plaintiff's counsel may perhaps be subjected to disciplinary proceedings. And the defendant may also substitute a bond if he can procure one with a responsible surety. Undoubtedly this drastic remedy proves efficacious in collection matters where the defendant has property.

The following table shows the use of this remedy and a comparison between the attachments as ordered and the judgments as recovered.

TABLE "D"

THE USE OF ATTACHMENTS
SUPERIOR COURTS OF CONNECTICUT, AS IN TABLE "A"

TOTAL CASES	No. of Cases Attachments Ordered	No. of Cases Attachments Had	Attachments Had and no Money Recovery	Attachments Had and Cases Discontinued or Withdrawn	Difference Between Amount Recovered and Attachment made						
					$1 to $100	$100 to $200	$200 to $500	$500 to $1000	$1000 to $2000	$2000 to $5000	Over $5000
8,461	2,627	1,607	132	1,082	12	10	59	61	60	64	68

The large number of cases where the attachments seem grossly excessive will be noted. The actual value of the property attached in each case cannot be stated, since the sheriff simply makes return to the fact of making the attachment and does not pass upon the effectiveness of his act. A few cases from the early part of the year 1925 from Hartford and the cases from Waterbury have not been available for this table.)

Outside of the matters here stated no judgment upon the Connecticut law of attachment is here attempted.

THE USE OF DEMURRERS, PLEAS AND MOTIONS TO CORRECT

In Connecticut the code reform of procedure became effective January 1st, 1880. The code was largely the work of the late Simeon E. Baldwin, and being drafted at a comparatively late date, incorporates many of the best features of the English practice and avoided some of the pitfalls of the usual code procedure. Among other matters, the incorporation in the practice act of many simple suggested forms of pleading served to furnish the bar with models which they could follow. The Connecticut practice act has proven one of the most successful in this country.[6]

This seems to be borne out by the following table, which does not indicate an excessively large number of decisions on purely procedural points.

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[6] See Ch. I of the writer's book on Code Pleading, n. 3 *supra*.

TABLE "E"

USE OF DEMURRERS, PLEAS AND MOTIONS

Superior Courts of Connecticut as in Table A

TYPE OF PLEADING	No. Filed	No. Sustained	No. Overruled	Judgments next after ruling	Appeals following	Withdrawn or Discontinued after ruling	Re-pleading after ruling	Re-pleading without ruling	Withdrawn or discontinued without ruling
Demurrers	363	109	142	25	4	76	155	59	52
Pleas in Abatement or to the Jurisdiction	85	12	17	6	2	9	14	34	22
Motions for a more specific Statement	450	150	44	5		30	123	137	71
Motions to Expunge, Erase, Strike or Quash	107	38	44	2		27	36	11	14
Totals	1005	309	247	38	6	142	328	241	159

It may seem from this table that these famous pleading instruments, though they may prove effective in isolated cases, have little effect in the great bulk of the cases. Where employed, they seem to affect the course of the case very little, except somewhat to delay it. The most usual course seems to be a repleading, either after or without waiting for a decision of the court. (The item "Repleading without Ruling" is actually larger than as shown here; repleadings by the *same* party were not available from New Haven).

In Connecticut, unlike most code jurisdictions the plea in abatement or to the jurisdiction is retained. The yet more modern tendency is even to abolish the demurrer. It would seem a proper question for further consideration whether the comparatively little aid towards a solution of the case afforded by these forms of pleading justifies their retention in view of the fact that they can be successively used by a single perverse and obstinate litigant. There is a high number of duplications of these pleadings in a single case. In New Haven, for example, there were 59 duplications in 33 cases in one year; occasionally as many as 8 of these pleadings occurred in a single case. In Hartford County for the year involved there were 154 such pleadings filed in 115 cases, of which duplications, ranging from two to four in number occurred in 32 cases having a total of 71 such pleadings. At the present time the total number of duplications for the three counties is not available, but it seems apparent that they occur in one-quarter to one-third of the cases where such pleadings appear at all. It is clear therefore that a resort to these devices successively by a single litigant is not unusual. The possible gain may seem not worth the opportunity afforded for such dilatory tactics.[7]

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7 A table now being compiled indicates strikingly how the rules may afford opportunity for delay. The rules of court provide that a motion must be filed within 15 days after the return day of the writ, and a demurrer or answer within 20 days, but by statute, Acts of 1923, ch. 123, no penalty may be imposed except for violation of an order of court entered after notice and a hearing. Hence a defendant may delay filing his pleading until the court orders him to plead. In the years 1925 and 1926 in the Superior Court at New Haven answering pleadings (answer, motions or demurrers) were filed in 1281 cases as follows: within 20 days in 353 cases (27.6%); within 45 days, in 403 more (31.5%); within 3 months in 226 more (17.6%); and after 3 months in the remaining 299 cases (23.3%). Corresponding figures for the Court of Common Pleas at New Haven were: total cases 1408; answering pleading filed within 20 days in 308 cases (21.9%); within 45 days in 312 more (22.2%); within 3 months in 372 more (26.4%), and after 3 months in 372 more (26.4%); and after 3 months in the remaining 416 cases (29.5%).

The relatively few cases in the Federal Court may make it again unfair to attempt deductions as to the use of demurrers, pleas and motions in that court. Here, also, the use seems relatively much in excess of that in the state courts.

A PROGRAM FOR FUTURE RESEARCH

The present plan of the school is to continue the investigation here undertaken, extended to other jurisdictions, for a period of five years. This period should be sufficient to permit of the acquiring of important comparative data from several jurisdictions, and of a determination whether the work should be indefinitely continued.

It is proposed next year to extend our investigations to a study of the records of criminal cases and to extend and complete the investigation of civil causes in Connecticut. A beginning will be made in acquiring similar figures from other states, probably first from New York and Massachusetts. Later the investigation will be extended to still other jurisdictions, perhaps those with somewhat different forms of procedure from our own, in order to afford a proper standard of comparison. It would seem especially desirable to acquire such data from England and from the continental countries, such as France and Germany, which have quite different methods of law administration. It is felt that the limits of possible investigation of this kind are only set by the capacities of the investigators. Thus it may be possible eventually to go behind the court records and to trace somewhat the potential law suits which never come into court. Possibly other institutions may be able to institute like investigations. This is much to be desired, for the more data available for comparison the more accurate will be the results.

RECENT MISSISSIPPI CASES

APPEAL AND ERROR

Appeal and Error, Key 1161.

Appellee filed in the Supreme Court, his consent to reversal of decree on all the grounds assigned by the appellant, but without determining the nature or extent of error assigned.

HELD: Decree will be reversed on "confession of errors", without giving any views as to the extent of the error, and cause remanded for proceedings consistent with equity practice.

Reversed and Remanded.

Cameron v. Baker, Gieb & Schaub Motors Co., 118 So. .....

Appeal and Error, Key No. 395.

The record in this case did not contain an appeal bond but on the record is a notation of the clerk of the circuit court: cost of transcript, $30.45, paid by appellants; $20 deposited with the clerk of the Supreme Court.

HELD: Under Section 24, Hemingway's Code, 1927 (section 49, Code of 1906) which provides among other things, that if appellant prepays the cost of transcript, bond for the sum of $100 shall be sufficient, the action of the appellant was insufficient because the bond was not given. Where no such bond is given, the appeal will be dismissed.

Howell, et al. v. Miller, 118 So. 178.

ARSON

Arson, Key No. 25, 37 (3).

School v. School Districts, Key No. 21, 64, 65.

James Sheedy was convicted of arson and appealed. Reversed and appellant held over to grand jury. He was indicted on a charge that "he did set fire to and burn a certain school building, to-wit, the school house, the property of the Union School District, in said county, contrary," etc.

HELD: (1) In an indictment for arson, state must allege an ownership of property burned and proof must conform to indictment as to said ownership.

(2) Indictment charging a felonious burning of a public school building is not sustained by a proof of title in certain individuals as trustees.

(3) Public school districts are mere agencies of state. They are not declared by statute to be had, incorporated, and have no power to buy, sell or own land as such.

Sheedy v. State, 118 So. 372.

AUTOMOBILES

Automobiles, Key No. 243 (4); 201 (2).

The Supreme Court in 118 So. 298, held that in an action for injuries resulting to the plaintiff when struck by the defendant's automobile on a highway that in order for the plaintiff to recover under section 6681, Hemingway's Code 1927, which regulates the speed of motor vehicles under certain conditions, it must appear that the injuries must have been proximately caused by the violation of said statute. Evidence relating to the defendant's

general reputation as being a reckless driver was held not to be admissible since the issue was whether or not he was driving recklessly on this occasion.

Pounders v. Day, 118 So. 298.

Automobiles, Key No. 246 (8).

In a suit for the recovery of damages for personal injuries resulting from a collision between automobiles, the Court held that an instruction which authorized recovery in case defendants undertook to pass plaintiff on public highway at a greater rate of speed than 8 miles per hour was erroneous since Hemingway's Code, 1927, section 6681, does not limit right of vehicles to 8 miles an hour except when passing person driving horse or domestic animals or person walking on roadway or passing public school or place of public worship on Sabbath day.

Gardner v. Gardner, 118 So. 300.

Automobiles, Key No. 155.

Plaintiff was injured when her automobile collided with railroad switch guards, which were located on or near the roadway on the railroad's property paralelling railroad's tracks. The way was graveled and was made for people desiring to load or unload goods.

HELD: An invitation to go on the premises of another is inferred where there is some common interest or mutual advantage while a license is inferred where the object is a mere pleasure or benefit to the person using it. The plaintiff was held to be a licensee because she was not engaged in any act for the common benefit of them not of common interest. Such being the case, the railroad owes her the duty only not to wilfully or wantonly injure her, which was not the case here.

Robertson v. Y. & M. V. R. Co., 118 So. 181.

ARREST

Arrest, Key No. 63 (4); Intoxicating Liquors, Key No. 236 (62), 238 (1).

A deputy while driving along highway passed a vacant house that had been a filling station, detected the odor of whisky and got out of his car to make an investigation. He discovered defendant with others inside house. Defendant had bottle in his hand as deputy approached, broke same. The deputy testified that there was liquor in said bottle. Defendant denied this and contended that the bottle was not his.

HELD: The presence of whisky may be established by smell as well as by vision. The facts of the officer smelling whisky as he was passing, and on entrance found defendant with a bottle of whisky in his hand, which he broke, were sufficient to go to the jury on the question of possession. No warrant is necessary to make an arrest in such a case.

Schillings v. State, 118 So. 137.

ESTOPPEL

Estoppel, Key No. 69.

A suit was brought by one claiming to have been the common law wife of a deceased soldier before his death, for certain insurance which the U. S. Government allowed soldiers to take out. In a former case, the petitioner had testified that she was not married but was single, giving a name different from that of the deceased soldier, and further testifying that they were to be married upon his return from the war. She had made affidavit to an officer

of the United States Government, in reference to her right as claimant of proceeds of insurance policy of said soldier, that she did not claim to be his wife. In this former suit, the heirs at law of deceased soldier had borne the expense of the litigation.

HELD: That the petitioner was estopped from setting up such claim because such claim is inconsistent with her sworn evidence and statement, the fact that she did not know the law governing marriages at the time of the suit in which she testified as a witness being immaterial.

Bracey v. Crisler, 118 So. 138.

EVIDENCE

Evidence, Key No. 317 (10).

Appellee brought suit for damages done to his car, the same resulting from a collision with the defendant's truck. One ground of negligence relied on to establish liability of the appellant was that the brakes were defective, thereby rendering it hard to keep the truck under control. A witness was asked the question as to whether the driver made the statement to his employer some time before that the brakes were not working well, to which the witness replied yes.

HELD: It was not shown that these statements were made as part of the res gestae. The condition of the brakes was a material one. The evidence was hearsay and incompetent, and which if allowed in evidence would be prejudicial to the defendant's cause.

Tullio v. Smith, 118 So. 195.

INTOXICATING LIQUORS

Intoxicating Liquors, Key 249.
Criminal Law, Key 394.
Criminal Law, Key 741 (1).

The appellant was convicted and sentenced in the Circuit Court of having more than one quart of intoxicating liquor in his possession. The sheriff had reliable information that one Carpenter had liquor in his home, that he was selling it, and that cars were coming to Carpenter's house for liquor. The sheriff having obtained a search warrant, with his deputies set out for the home of Carpenter. Within a mile of the home of Carpenter they met the defendant in his car and the sheriff got out and hailed him to stop. The sheriff frankly stated that at the time he halted the defendant he had no information that the defendant was in that vicinity, and that he had no information that the defendant had liquor in his possession; but that upon ascertaining that one McClanehan was in the car with the defendant he became suspicious and pulled aside the back curtain of the defendant's car and discovered a ten gallon keg of whiskey.

HELD: Under these facts there was no probable cause for the search of the car, and that the evidence procured by the unlawful search of the car was inadmissible in evidence. See Laws of 1924, c. 244.

There is nothing in this case to show that the sheriff believed, or had reason to believe, that liquor was being transported in an automobile by the defendant, before he halted the car and made the search, and he had no search warrant therefor.

As all of the evidence was secured by the unlawful search a peremptory

instruction was proper and should have been granted.

Reversed and Remanded.

King v. State, (No. 27352), 118 So. .....

Intoxicating Liquors, Key No. 233 (2).

In *Horton v. State,* 118 So. 373, the Court held that where a witness for the State testified to the purchase of liquor and where immediately after such purchase other witnesses in company with the State's witness, went to the place where the defendant was and arrested him and found intoxicating liquor on the side of the road by the defendant it was competent for such witnesses to testify as to the finding of such liquor and that the container was nearly full of liquor and that other bottles were found in the defendant's car containing some whisky and, further, that such witnesses were not subject to the objection that the State bolstered up its witnesses in such trial.

Horton v. State, 118 So. 373.

INFANTS

Infants, Key No. 16.

Prisons, Key No. 1.

Parent and Child, Key No. 2 (2).

Constitutional Law, Key No. 306, 274, 83 (2).

Petition that minor be committed to Mississippi Industrial Training School. It appears from the record that the minor, one Bryant, was 13 years of age, and that he resided with his parents in Hattiesburg. Prior to Feb. 9, 1927, Bryant had been committed to said institution by order of chancery court setting up that he had violated certain laws and ordinances involving moral turpitude. Remaining in said institution for several months, he was discharged on habeas corpus which was filed by his mother. On the same day of Bryant's discharge, the appellee, a probation officer, filed another petition before the same chancellor who had heard the habeas corpus. In this petition, it is alleged that the petitioner is such a person as is authorized by chapter 111, Laws of 1916, to file a petition for the confinement of destitute and delinquent children.

The petition alleges that the minor lives with his parents, that the general environment of the child is such that he is likely to develop criminal tendencies unless he is removed from his present surroundings, that he has committed felonious offences, involving moral turpitude many times, etc. The parents of the child were made defendants to the petition. Process was prayed to be issued as provided by the statute and made returnable not less than 5 days from issuance, etc. Petition was sworn to by the petitioner.

Defendant petitioned the Court for a bill of particulars, setting out the crimes which were alleged to have been committed by the minor. In answer, the bill of particulars was given which set forth facts that the minor had been convicted of petit larceny two or three times, that he had been convicted of being a suspicious and dangerous person two times, etc.

The bill was demurred to.

HELD: Under sections 5697-5721, Hemingway's Code 1927, (chapter 111, Laws of 1916), the child and its parents are entitled to a hearing and a trial according to law, and proceedings in conformity with the provisions of the said act do not violate the due process clause of the Constitution.

A jury trial is not required in such a hearing before the chancellor in the chancery court to commit a minor who has been guilty of a violation of the

law involving moral turpitude, or who is a delinquent child developing vicious and criminal tendencies because such a proceeding is a civil and not a criminal one.

Parents, as a general rule, have the right under the 14th Amendment to the control and custody of their children but where they fail to perform their duty to make the child intelligently and morally upright, etc., the State, as parens patriae of all children in its limits, may assume control over such children to protect it and to prevent injury to the public.

Where a child is tried in the circuit court for a crime involving moral turpitude, such trial is conducted as other criminal cases are; and the fact that after the child is convicted and committeed to the Industrial School does not render the School a prison. But, when such a case is transferred to the chancery court and there tried, it is conducted according to the usual chancery cases as to procedure, and the hearing is governed by the rules for the trial of civil cases. The reason for this is that the proceeding is not for the purpose of trying the child of a specific crime but evidence of the crimes which it had committed are received for the purpose of determining whether in fact the child is immoral, delinquent—dealing with the character of the child and its environment rather than any criminal law enforcement.

Chapter 132, Hemingway's Code, 1927 (chapter 111, Laws 1916) is not a violation of the state and federal constitutions with reference to involuntary servitude because said constitutional provisions do not have regard to the legitimate authority for the education and control of children, a child being subject to discipline that could not be applicable to adults.

Bryant, et al. v. Brown, 118 So. 184.

INSURANCE

Insurance, Key No. 763.

Suit by beneficiary to recover life insurance. The insured was a member of the defendant order and had taken out insurance in same. He had failed to pay his assessments. The local recorder told insured that it would be satisfactory for latter to pay assessment on the following week. It was no general custom for the defendant to acquiesce in such agreements by its local recorder. The insured died before paying assessment, and beneficiary tendered same during the following week but same was refused.

HELD: That the beneficiary could not recover the policy since the recorder by agreeing to allow the insured to pay assessment during the following week did not waive the other requirements for reinstatement.

Modern Order of Praetorians v. Griffin, 118 So. 175.

Insurance, Key No. 360 (3).

Contracts, Key No. 3.

Suit by beneficiary against insurance company on two insurance policies, one a straight life policy, the other a combination life and sick and accident policy, which had been issued by defendant to insured—premiums payable weekly with provision that in event the weekly premiums were not paid in advance for four consecutive weeks, the policies should lapse and become null and void. At the time of the insured's death, premiums had not been made for more than four weeks—his illness preceding his death having lasted for more than a month. There had accumulated on the combination policy benefits in the sum of $8.25, which was more than enough to pay the premiums on both of the policies.

HELD: The insurance company must apply such funds due the beneficiary (after the insured's death) to the payment of the unpaid premiums and can not escape liability by refusing to make such application. Such is the case regardless of the fact that tender of the amount due as benefits had been made to the insured and had been refused by him.

Courts do not favor forfeitures, when to do so would be against equity and good conscience.

National Life Ins. Co. v. Sparrow, 118 So. 195.

INJUNCTION

Injunction, Key No. 89.
Quo Warranto, Key No. 7.
Nuisance, Key No. 18-28, 33.

One Redmond, claiming supernatural power to diagnose disease and to prescribe cures, was engaged in the sale of herbs to patients previously diagnosed by him. He had no license to practice medicine or pharmacy and the conditions under which he administered his cures were filthy. Attorney General filed a bill in equity praying for an injunction to restrain Redmond from such practices. Injunction was issued and defendant appeals. Reversed and bill dismissed.

HELD: (1) A person using medicine pursuant to diagnosis is engaged in "practising medicine". (Hemingway, 1927, sec. 7452). (2) A person preparing medicines from herbs under directions contained on a package is not practicing pharmacy. (Hemingway, 1927, sec. 7413-7436.) (4) A writ of quo warranto is an appropriate remedy to prevent one from practicing medicine without a license.

(5) There is a legal remedy against nuisances at common law.

(6) Equity has no original jurisdiction over nuisance. It will not be exercised unless a case of actual and pressing necessity is shown. Generally equity will refuse relief against nuisance until its existence has been established at law.

(7) The legal remedy for nuisance, provided by law, must be followed in all cases which do not show a nuisance per se. Practice of medicine is not a nuisance per se even without a license.

Redmond v. State ex rel Attorney General, 118 So. 360.

MONOPOLIES

Monopolies, Key No. 13, 17 (1).
Monopolies, Key No. 17 (2).

Contract wherein the plaintiff oil company agreed to build and equip a filling station on the defendant's land and to sell petroleum products to the defendants at the lowest dealer's prices, and the defendants agreed to use the plaintiff's products exclusively for ten years in the station so constructed. Two years later the defendants entered into a contract with a third party to lease the said filling station for a period of seven months at a stipulated monthly rental. The plaintiff oil company filed its bill to restrain the defendants or its agents from using the filling station for any other use than the exclusive use of its petroleum products as contemplated in the prior contract. A temporary restraining order was granted, and the bill was demurred to. From an order overruling the demurrer, and an order refusing to quash the temporary restraining order, appeal was taken.

HELD: That the contract here involved falls far short of embracing the elements necessary to hold it void as being in restraint of trade. It in no wise attempts to limit production or control or to fix the price in the market of the commodities embraced in it. It is reasonable in its terms, and limited as to time, space, and extent of trade. A contract so constructed is not in restraint of trade. Affirmed.

McQuaig et ux. v. Seaboard Oil Company.

MUNICIPAL CORPS

Municipal Corporations, Key No. 29 (4); 33 (10).

The Supreme Court in *City of Pascagoula v. Krebs,* 118 So. 286, held that where a municipality by ordinance undertook to extend its limits to include a portion of territory of another existing town without its consent was void since one municipality cannot extend its boundaries so as to include another without the consent of that other. Such action is subject to collateral attack by proceedings to enjoin the collection of taxes.

Pascagoula v. Krebs, 118 So. 286.

Municipal Corporations, Key No. 733 (2).

Where the municipality forced prisoner to work on streets with shackles and chains in accordance with Hemingway's Code, section 6781, the Court held that the municipality was exercising its statutory of maintaining the repair of its streets and was in the exercise of a corporate function—such being a mere incident to the carrying out the imposition of the sentence.

Warren v. Town of Booneville, 118 So. 290.

Municipal Corporations, Key No. 120; 602.

Defendant town had passed an ordinance which prohibited any building of sheet iron, wood or other combustible material, from being erected within certain limits. Complainant erected bill boards of thin walls with sheet iron surface over wooden frame work with supports to keep it from falling, in this district. This suit was brought for an injunction to restrain defendant from removing the bill boards.

HELD: In construing such a statute, words will be taken in their usual and common acceptation unless the evident intent of the legislature would be violated. Since the statute in controversy was restrictive of the rights of an owner, it must be strictly construed. For these reasons, the Court held that bill boards were not within the contemplation of the statute and therefore the injunction should be granted.

Town of Union v. Ziller, 118 So. 293.

Jury, Key No. 25 (6).

Jury, Key No. 31 (1).

Municipal Corporations, Key No. 764 (1).

Suit by Pamelia Clark against City of Jackson. Judgment for plaintiff, and defendant appeals. Declaration and proof shows that city opened a drainage ditch across a public thoroughfare and placed a plank across the ditch for pedestrians to use in crossing, that said plank was insecure and inadequate and that plaintiff, using due caution, slipped off the plank and was injured. Plaintiff filed her declaration, and defendant filed general issue. Neither side asked for jury. Plaintiff introduced her proof and rested. Defendant moved for final judgment on ground that a variance existed between declaration and proof and motion was overruled. Plaintiff asked for and

was given leave to amend declaration and defendant filed 3 special pleas, in each one requesting a jury trial, which was refused by the Court.

HELD: Defendant was not entitled to a jury trial because it was not asked for on original plea to declaration.

2. A reasonable regulation of the right to trial by jury is not a denial or impairment of that right.

3. Municipality has duty to keep its streets and sidewalks in a reasonably safe condition for persons traveling in the usual way and exercising due care for their safety.

Municipal Corporations, Key No. 764 (1).

4. Request for jury trial in county court after filing plea and answer is at discretion of Court.

5. Refusal of such request not an abuse of discretion.

City of Jackson v. Clark, 118 So. 350.

Case affirmed; Elbridge, J., dissents.

NAVIGABLE WATERS

Constitutional Law, Key No. 1 (6).

Statutes, Key No. 181 (1).

Nav. Waters, Key No. 1 (6); 36 (1-3); 37 (2).

Deeds, Key No. 77.

Suit by A. B. Wood against H. D. Money, et al. Money et al purchased certain land from the State, lying in Mississippi Sound and being land lying between high and low tide, for purpose of erecting a pleasure resort thereon. Wood, plaintiff, was owner of certain property on Deer Island, off the beach, and also property on the beach. He files a bill in chancery to enjoin defendants from erecting such a structure as they propose, since it interferes with his property rights. He alleges that land commissioner has no right to sell such property. Defendants rely on sec. 2919, of Code of 1806, which gives land commissioner power to manage and dispose of state lands. Judgment for plaintiff, and defendant appeals.

HELD: (1) A statute, if its language is broad and if reasonably possible, must be construed so as to harmonize with the public policy of the State as set out in the Constitution.

(2) The constitutional provision for the maintenance of the navigable waters of state free from obstruction applies to Mississippi Sound.

(3) Land lying between high and low tide is held by state as trustee for public and this prohibits their permanent alienation.

(4) Land commissioner has power to convey land, and this term does not apply to submerged lands lying below high tide in Mississippi Sound.

(5) Where a deed is void, being made by an officer with no authority, it may be attacked collaterally.

Money et al. v. Wood, 118 So. 357.

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A. F. FOX, West Point.....1911-1912
R. N. MILLER, Hazlehurst.....1912-1913
ROBERT B. MAYES, Jackson.....1913-1914
SYDNEY SMITH, Jackson.....1914-1915
R. B. CAMPBELL, Greenville.....1915-1916
A. T. STOVALL, Okolona.....1916-1917
A. A. ARMISTEAD, Vicksburg.....1917-1918
S. E. TRAVIS, Hattiesburg.....1918-1919
J. B. HARRIS, Jackson.....1919-1920
GABE JACOBSON, Meridian.....1920-1921
GEORGE J. LEFTWICH, Aberdeen.....1921-1922
J. B. HOLDEN, Jackson.....1922-1923
R. H. THOMPSON, Jackson.....1923-1924
STONE DEAVOURS, Laurel.....1924-1925
J. N. FLOWERS, Jackson.....1925-1926
D. W. HOUSTON, Aberdeen.....1926-1927
R. E. WILBOURN, Meridian.....1927-1928
GEORGE W. CURRIE, Hattiesburg.....1928-1929

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J. H. PRICE.....Magnolia
R. E. WILBOURN.....Meridian
JOHN L. HEISS.....Gulfport
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The University comprehends eight divisions, as follows:

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The School of Engineering, founded in 1900, covering four years of standard civil and electrical engineering courses;

The School of Education, founded in 1903, meeting the needs of all who intend to teach in the schools of the State;

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MISSISSIPPI LAW JOURNAL

JOURNAL of the STATE BAR ASSOCIATION

VOL. I APRIL, 1929 NO. 4

In Memoriam

J. S. SEXTON

By R. H. Thompson

An eminent member of this, the Copiah County, bar has passed from life to death; James S. Sexton died at Memphis, Tennessee, on the 3rd day of November, 1928; he died suddenly while passing through that city on his way to visit his daughter in the state of Virginia.

Mr. Sexton, our departed brother, possessed in a marked degree the two indispensable requisites to the success of a lawyer, inflexible integrity and untiring energy; he never ceased to work diligently to promote his clients' interest and to enlarge his knowledge of the law. It is not unlikely that his death was hastened by overwork, especially in the last years of his life, after his health became impaired.

Our deceased brother was born near Crystal Springs, in Copiah County, Mississippi, on the second day of November, A. D., 1854, and was 74 years of age the day before his death; he remained a resident citizen of the county of his birth during his entire life, was greatly respected by the people of the state to whom he was known, personally or by reputation; especially was he well known and respected by the people of that part of the State of which he was an eminent and most worthy citizen. He received his early education in a private school near his home, his preceptor being George Morrison, an unusual character, a great student and a profound mathematical scholar who with care accumulated a considerable library of rare and valuable books, which he gave his pupil as a token ot appreciation of Mr. Sexton's intellectuality. These books were cherished by our departed brother and were

largely the foundation of his extensive information on interesting subjects, within the knowledge of but few lawyers. Mr. Sexton was a student of the University of Mississippi during its 1872-1873 and 1873-1874 annual sessions, passing with credit its freshman and sophomore classes in the Bachelor of Arts courses, but was unable to attend its sessions longer. While he did not graduate, the University in 1911 conferred on him the honorary degree of LL. D. because of his eminence as a citizen and lawyer and the valuable service rendered the institution as a member of its board of trustees.

After leaving the University in 1874, Mr. Sexton engaged for a time in farming and in teaching school in his native county, during which time he diligently and successfully studied law, having for his preceptor Judge Tim E. Cooper, at the time an eminent and successful member of the Copiah County bar and afterwards for many years a worthy and distinguished Judge of the Supreme Court of Mississippi.

The members of the bar who came in contact with them recognized one striking particular in which the preceptor and the pupil were alike; they were advocates of force and character, each was unusually resourceful, and it was said of each by their professional brethren that he never lost or was thrown from his balance and was always able and ready to combat with reason any proposition advanced adverse to his client's interest.

Mr. Sexton was admitted to the bar early in 1881; soon thereafter he began the practice of the profession at Hazlehurst and practiced there continuously until his death. His law practice was extensive and largely coextensive with the state; he was employed in many cases of more than usual importance and in all of them, whether large or small, he observed with fidelity the ethical standard of the profession. His practice was lucrative, enabling him to leave to his legatees, devisees, and loved ones a highly respectable estate.

Mr. Sexton was married twice; his first wife was Miss Mary E. Wilson of Copiah County, whom he married in 1875. She died in Hazlehurst in 1888, leaving a daughter, Mrs. R. E. Higdon, now a worthy matron of Brookhaven, Mississippi, and a son, Luther Seymour, who became a promising young lawyer of Hazlehurst, of whom his father was justly proud; the son died in 1920. Mr.

Sexton married the second time in 1889, Miss Lillian Ruth Wise of Jefferson County, Mississippi, an accomplished woman, becoming his wife. Four daughters were born of this marriage—Kathleen, who married Mr. George S. Holmes, now living in Washington, D. C.; Jamie, who married Mr. Peter H. Holme, now living in Denver, Colorado; Frances, who married Dr. Alex F. Robertson, Jr., now living in Staunton, Virginia; and Dana, who married Dr. Atha Thomas, now living in Pueblo, Colorado. Our departed brother was an affectionate husband and father, proud of his wife and children. His domestic relations were beautiful and gave him happiness.

Mr. Sexton was elected a delegate from the state at large to the Constitutional Convention of 1890, was the youngest of the fourteen delegates from the entire state in that convention, and was prominent and efficient in its proceedings, and commanded and received the respect and confidence of every member of the convention. He attended three separate reunions of the surviving delegates to the convention, one held in 1910, one in 1927, and the other in 1928. The last meeting was only two days before his death. He delivered a notable address at the 1927 reunion, which has been published in a widely distributed pamphlet containing the proceedings of that meeting.

Mr. Sexton was a founder and an original member of the Mississippi State Bar Association; he attended every meeting of the association except the last one, held in 1928. His absence from that meeting was unavoidable, greatly to his regret. He was an active member of the association, took a decided interest in its proceedings, and was its president in 1908-1909, and discharged the duties of the office efficiently and well.

In 1907 Mr. Sexton became a member of the American Bar Association and maintained his membership therein until his death. He attended many meetings of the association, interested himself in its proceedings, and became personally acquainted with a large number of the most distinguished American lawyers, many of whom became his friends. He was vice-president of the association in 1909-1910, a member of its general council in 1911-1912, and he served at various times as a member of the association's important committees, among them the notable committee to oppose judicial recall.

Our departed brother was a member and president of the Board of Trustees of the State University and Colleges created in 1910, and rendered valuable services to the state in that capacity for a number of years. When the board was reorganized in 1926 he was again named as a member of the board and continued to be a useful member of it until his death. He was at the time of his death a trustee, and had been one for a number of years, of the Utica Normal Institute, a school for the education of colored pupils located at Utica, Mississippi, and earnestly sought to promote its usefulness.

Our departed friend was broad-minded, liberal in his views, and in every way was a worthy and useful citizen; he honored and adorned the legal profession, and his loss to it and to the country, as well as to his family and friends, is a grievous one.

T. C. CATCHINGS

By R. L. McLaurin

Thomas Clendenning Catchings, born on the 11th day of January, 1847, on the plantation of his father near Bolton, in Hinds County, Mississippi, after a long and useful career, departed this life on the 24th day of December, 1927.

That he was always a polished gentleman could not well have been otherwise, for he was the only son of a gentle parentage, cultured and refined to the last degree.

Born and raised in affluence, his early opportunities were exceptionally good and he took exceptional advantage of them until the outbreak of the war between the states, when his course at Oakland College was cut short.

Although a mere lad, at the first call to arms he entered the service of the Confederacy.

He was in the first battle of Mannassas, and remained in active service until his command was disbanded in Alabama, after the capture of President Davis.

The war over, he studied law in the office of Harper and Shelby in Brandon, Mississippi, and after admission to the bar practiced his profession in Vicksburg with distinguished ability until he was elected and became Attor-

ney General of Mississippi in January, 1878. He served as Attorney General until 1885, when he resigned. He was elected and served for sixteen years continuously as Congressman from the old Shoe String District. When he voluntarily retired he was at the head of the Ways and Means Committee and floor leader on the Democratic side.

Retiring from Congress, he returned to Vicksburg and continued to practice law with ever-increasing ability and reputation until death relieved him of his labors.

His faithful wife preceded him to the grave about one month. Thereafter he did not appear to take much interest in this earthly existence. His life had already been long extended beyond three score and ten. He passed away possessing all of his faculties, rich in honors and glorious with praise, surrounded by loved ones, his neighbors and his friends.

Nature sets indelible marks upon the productions of which she is proudest.

His outward form proclaimed the man. His compact, firm-knit frame, his heavy shoulders, his round head, his striking face, bearing the furrows of many fierce battles, in war, in politics, and at the bar, but from which there still shone his gentle, kindly nature, all indicated his purpose, a man easy to approach but dangerous in conflict.

As a soldier (always a private) he is said to have been obedient to his officers and kindly and considerate of his companions in the ranks. He was without fear.

As a statesman he had broad views and compassed the interests of his whole country. Learned in constitutional law, in history, ancient and modern, a classical scholar, he was prepared at any time to take an intelligent stand in current affairs and to contend for the best interests of his country.

He was an able lawyer, well equipped and well prepared on a given occasion. Above all he was a patriot and a Christian gentleman. To him the arrogance of intellect was offensive, but the arrogance of ignorance was intolerable.

If I were called upon to suggest an epitaph, I would say, in the language of the poet:

An honest man here lies at rest,
As ever God in human form has blessed;
A friend of man,
A friend of truth,
A friend of age,
A guide to youth.
If there is another world,
He lives in bliss.
If there is none,
He has made the best of this.

E. B. HARRELL

By H. B. Greaves

The subject of this sketch, Honorable E. B. Harrell, was born at Carrollton, in Carroll County, Mississippi, on the 27th day of April, 1868. While still a young boy, his parents removed from Carroll County to Madison County, Mississippi, and resided on a farm near the little town of Madison Station, Mississippi. Shortly after this, Mr. Harrell's father died, and left him with his mother and several small children, of which he was the oldest. He spent his early youth on the farm, assisting his mother in supporting and caring for his brothers and sisters.

Mr. Harrell received his education in the country school in that community, and afterwards went to Millsaps College.

After he left Millsaps College he was admitted to the bar of Madison County, practicing law for a few years at Madison Station, where he had removed from his country home. While practicing law at Madison Station he was appointed deputy chancery clerk of Madison County by W. O. Baldwin, and in that capacity he served the county for four years. At the end of that time he opened an office for the practice of law at Canton, and devoted himself exclusively to the practice of his profession, although he had farming interests.

Mr. Harrell married Miss Sallie Catherine Ray in May, 1896, whose family is of the oldest and most respected of Madison County. His wife survives him.

Mr. Harrell served Madison County for four years in the State Senate, but declined to run for re-election; Mr.

Harrell enjoyed the confidence and respect of his colleagues while a member of that body.

In 1924, Mr. Harrell was elected mayor of the city of Canton, and served one term as such. During his administration he made an efficient and capable mayor, and a great many improvements for the betterment of the city of Canton were made. After his term as mayor expired, Mr. Harrell continued the practice of law in Canton, until his death.

Mr. Harrell was an elder in the Presbyterian Church at Canton, where he was one of its most consistent members.

Mr. Harrell enjoyed a substantial practice and enjoyed the respect, confidence, and friendship of the members of the bar of his home town. He was a member of the Mississippi State Bar Association, Knights of Pythias, and The Elks.

Mr. Harrell was a gentleman; kind and generous to his opposing counsel, yet always giving his client all the ability at his command, and in the trail of causes, his conduct rarely, if ever, left a sting.

The city of Canton and Madison County have suffered a loss in his death, and the bar an honored and respected member.

REPORT OF THE COMMITTEE ON OBITUARIES AND MEMORIALS

To George W. Currie, President of Mississippi Bar Association:

Your Committee on Obituaries and Memorials begs leave to report that since the last meeting of this Association, death has been unusually busy at his accustomed work among the lawyers of Mississippi and of this Association. Since our last meeting, nine members of the Association have died, viz.: H. B. Harrell of Canton, J. R. Rousee of Newton, F. H. Lotterhos of Jackson, T. C. Catchings of Vicksburg, James S. Sexton of Hazlehurst, R. B. Campbell of Greenville, T. H. Sommerville of Oxford, and Bruce L. Newsome of Grenada.

Twenty-two, not members of this Association, have died, viz.: G. E. Wilson of Philadelphia, Henry Mounger of Columbia, C. G. Mayson of Hattiesburg, Wyatt Easterling and B. F. Cochran of Meridian, W. C. McLean of Grenada, S. L. Dodd and Jason Niles of Kosiusko, Judge ——— Howery of Oxford, G. A. McLean of Winona, Carl Stingly of Gulfport, H. C. Watson, E. J. Bogen, Walter Shields and V. D. Bodie of Greenville, Guy J. Rencher of Columbus, T. M. Cooper of Jackson, W. S. Bates of Houston, W. A. Gullege of Jackson, T. G. Birchett of Vicksburg, Wm. T. Triblett of Carthage, and James B. Sternberger of Magnolia.

Obituaries of the deceased members of the Association will be read before the next session of the Association, and later published.

We submit herewith obituaries of the deceased members of the Association, to be read before the Association and for publication in the minutes.

D. W. Heidelberg,
J. W. Cutrear,
Jeff Truly,
C. V. Hathorn,
W. C. Shivers,
Committee on Obituaries and Memorials.

REPORT OF COMMITTEE ON PROFESSIONAL ETHICS

To the Mississippi State Bar Association. Mr. President and Gentlemen:

Your Committee on Professional Ethics begs leave to report as follows:

No inquiries have been made of this committee during the past year in reference to questions of professional ethics, and therefore we have no inquiries and answers to submit for your consideration.

In a report from this committee at the 1928 meeting of this Association, which report was prepared by Judge R. H. Thompson, then chairman of this committee, it was suggested that the Code of Professional Ethics of the Mississippi Bar Association is largely the same as that of the American Bar Association. The Association was also advised that a committee had been appointed by the American Bar Association to consider the adoption of certain supplements or amendments to the Code of Ethics of that Association.

Since that report the committee referred to has reported to the American Bar Association 13 amendments or supplements to the Code of Professional Ethics, 12 of which were adopted and which appear on pages 770 to 781 of the report of the American Bar Association for 1928, said supplements being numbered from 33 to 45.

In view of the fact that some of them are practically covered by provisions now appearing in the Code of Professional Ethics of the Mississippi Bar Association and the Statutes of the State of Mississippi, and that some of them refer to conditions and practices that do not prevail to any extent, if at all, in Mississippi, your committee does not recommend the adoption of any of them except No. 34—that provision in relation to division of fees, as follows:

"No division of fees for legal services is proper, except with another lawyer, based upon a division of service or responsibility. But the established custom of sharing commissions at a commonly accepted rate, upon collection of commercial claims between forwarder and receiver, though one be a lawyer

and the other not (being a compensation for valuable services rendered by each), is not condemned hereby, where it is not prohibited by statute.''

In the 1928 report of this committee the attention of the Bar Association was called to the fact that its Code of Professional Ethics had not been published for many years, and this committee urged its publication, but it has not yet been republished. We now recommend that the Code of Professional Ethics be republished in a bound volume, and that the Code of Professional Ethics of the American Bar Association be published with it, as an additional guide to the professional conduct of lawyers, and that it be distributed to the members of the bar at cost.

We respectfully submit this report for your consideration.

W. A. White, Chairman,
John D. Greene, Jr.,
D. M. Russell,
J. P. Alexander,
N. C. Hill,
Committee.

REPORT OF COMMITTEE ON JUDICIAL PROCEDURE AND REMEDIAL REFORM

To the President and Members of the State Bar Association:

Your Committee on Judicial Procedure and Remedial Reform, being impressed with the idea that all Judicial Proceedings should be designed to attain the closest approximation to absolute justice that is humanly possible, and to secure the substantive rights of all the citizens of the common wealth, guaranteed to them by the statutory and common law of the State of Mississippi, and that the remedies prescribed by the statutes and usages should be such as are best calculated to attain these ends; beg leave to submit the following:

First: We are of the opinion that the rule, prescribing the time for the filing of briefs in the Supreme Court, should be changed so as to require the assignment of errors and brief for appellant to be filed not less than thirty days before the day set for the call of the case on the Supreme Court calendar; that the reply brief of appellee should be filed not less than fifteen days before the day of call; and that the rejoinder brief of appellant should

be filed not less than five days before the oral argument. Briefly our reasons are: Appellant can begin to draft his brief at his most convenient time after the filing of the transcript, this giving him plenty of time; we think the appellee should have more time than the one week now allowed, as he has no control over the time of the filing of the appellant's brief, and it frequently happens that the appellant's brief is received by attorney for appellee when he is engaged in the trial of matters that cannot be postponed; so we think an allowance of fifteen days should be given to him after he has the assignment of errors and an opportunity to be advised as to the position taken by the appellant.

For the same reason we think that the appellant should have more time than five days, now allowed, within which to file his reply.

We think the rejoinder brief should be filed long enough before the oral argument to permit counsel for appellee to have opportunity to read same and give to the court on the oral argument his analysis of the authorities relied upon by appellant and of the contentions of appellant, contained in the rejoinder brief.

We are of the opinion that this will be fairer to all litigants and will make the oral argument more helpful to the court.

Second: We are of the opinion that Section 1650 Hemingway's Code, 1927, Section 1917 Code 1906, as construed by the Supreme Court in the case of *Whitehead vs. Kirk,* 104 Miss. 766, and the divers cases since that time following it, is an obstruction rather than an aid to the attainment of justice and that same should be amended by making the period at the end of the section a comma, and add the following or synonymous words "nor shall it apply upon the trial of the issue *devisavit vel non,* to any party undertaking to establish his or her right to participate in the distribution of the estate of a decedent, whether an heir at law or a distributee or legatee under an alleged will."

Mr. Tyler does not concur in this recommendation Number Two.

Third: We are of opinion that Section 7455 Hemingway's Code, 1927, being Section 3695 of the Code of 1906, should be amended by making the period at the end of

the existing section a comma, and by adding the words, or others synonymous therewith: "and excepting those cases in which the patient has put his physical condition in issue in a pending law suit and he himself testified, and except in case of a contested will in which an issue is made between the heirs at law of the patient and those claiming as legatees or devisees under the last will and testament of such patient, as to the physical and/or mental condition of such patient."

Mr. Tyler concurs in this recommendation to the extent of adding the words "and excepting those cases in which the patient has brought his physical condition in issue in a pending law suit and he has himself testified," but does not concur in the balance of this third recommendation.

Four: We are of opinion that Section 1522 Hemingway's Code, 1927, being Section 1821 of the Code of 1906, should be so amended as to permit a defendant in a replevin suit to deny possession, as now provided, and also plead that if he be mistaken, and is in reality in possession of the land called for by the description in the declaration contained, that he has been in such possession for more than ten years and that the bar of the statute of limitation has run in his favor.

Judge Cox and Mr. Heidelberg concur with the Chairman in all of the recommendations.

Mr. Guice, a member of the committee, has up to this time not replied.

Respectfully submitted,

A. W. Shands, Chairman,
Allen Cox,
R. W. Heidelberg,
Luther L. Tyler,
Members Committee of Mississippi State Bar Association on Judicial Procedure and Remedial Reform.

Biloxi, Miss., March 28, 1929.

Hon. A. W. Shands, Attorney,
Care of Shands, Elmore & Causey, Att'ys,
Cleveland, Miss.

Dear Sir:

You will pardon my having not acknowledged receipt of your report submitted by you to me in your letter of

the 22nd inst. However, this delay was caused by no unwillingness on my part to give it attention, but due to the fact that a term of the Chancery Court prevented me giving the same serious consideration that evidently you had given this matter.

Advising you with reference to this report, as to the amendments suggested in the order in which they are incorporated in the report, I advise as follows:

1. I agree with you on your first proposition.

2. I think it would be unwise to change or amend Section 1650 of Hemingway's Code of 1927, and am in favor of allowing it to remain as it is now written.

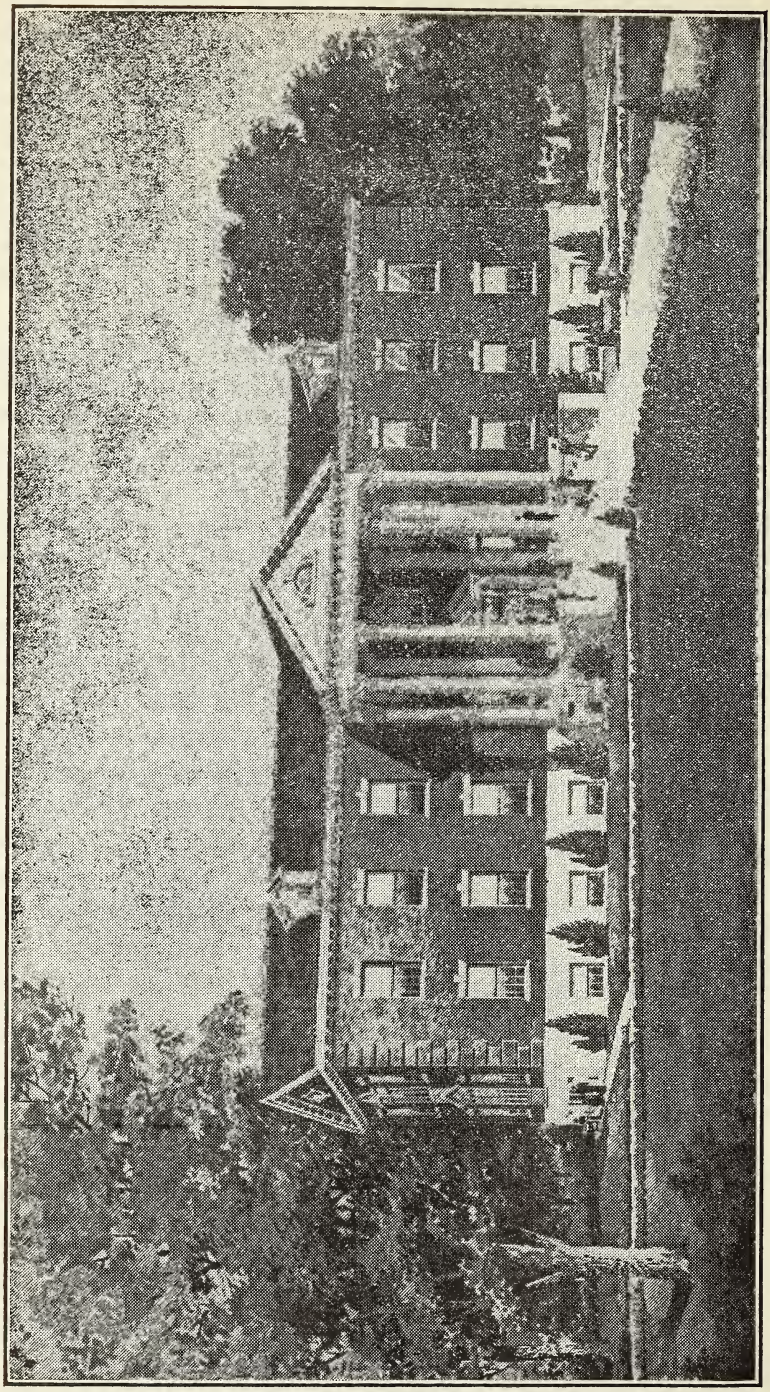
3. I agree with you as to your amendment of Section 7455 of Hemingway's Code of 1927, and while I have noted Mr. Tyler's objections, I think that the ends of justice would be paramount to the delicacy we owe the memory of departed persons, especially so in view of the fact that this could not injure the dead persons.

4. I agree with you with reference to your amendment of Section 1522 of Hemingway's Code of 1927.

I will again ask that you pardon my delay in replying to your letter, as well as my inability to meet you in Jackson, but trusting that my affairs will be such as to admit of my being present at the Bar Association, I am, with highest regards, Very truly yours,

W. L. Guice.

WLG:B



NEW LAW SCHOOL BUILDING

SKETCH OF LIFE OF JUDGE MAYES

Construction has been started upon many buildings at the University, among which is the new Law School building. The site of this building will be between the Chancellor's home and the old "morgue." The building will have a basement, in which there will be the offices of the Law Journal, a room for the law fraternities, a work room, and a smoking room. The space on the first floor will be taken up with three class rooms and three professor's rooms. On the second floor there will be a reading room at the west, while at the east there will be stack rooms, two professor's offices, a practice court room, clerk's office, and librarian's office. The mezzanine floor will be used as an expansion for the library.

The realization of the new Law School building might be said to be but the result of the original ideas of Judge Edward Mayes, who, while Chancellor of the University and Dean of the Law School, caused the building which is now used to be erected. It is interesting to note that the brick out of which this building was made was burned on the campus by University hands, and by them put together. There was no appropriation by the Legislature. Judge Mayes had received both his literary and law degrees here. He was the son-in-law of L. Q. C. Lamar. Besides being so instrumental in the betterment of the Law School, Judge Mayes contributed articles of interest to the literary world, among which are his "Life of L. Q. C. Lamar" and "Ribes of the Law."

Edward Mayes

The first chief executive of the University of Mississippi chosen from its alumni, and the first native of the state thus honored, was Edward Mayes, who was born in Hinds County, Mississippi, December 15, 1846. He attended Bethany College, Virginia, in 1860-1861, served in the Confederate Army in 1864-1865, graduated from the literary department of the University of Mississippi in 1868, and from the law department in 1870, acted as librarian and as assistant in English Literature during the year 1869-1870, was professor of law in the University from 1877 to 1892, chairman of the faculty 1886-1889, and Chancellor of the University 1889-1892.

Among the significant events and improvements during the administration of Chancellor Mayes, mention should

be made of the following: 1. His great controversy with Senator George on the Endowment Act of 1880, by which the State recognized its indebtedness to the University and provided for the appropriation to it of the annual interest upon this debt. That the settlement was unshaken shows how masterly was Chancellor Mayes' presentation of the University side of the question. 2. Erection of the old Library Building, now occupied by the Law School, the addition of several thousand dollars' worth of books and the reclassification of the entire library. 3. Renovation of the dormitories and professors' residences. 4. Reorganization of the curriculum in 1889, making the courses for the B. A., B. S. and B. P. degrees more distinctive. 5. Laying of brick walks on the campus and the purchase of the large new telescope. 6. The tour of the State in the interest of the University made by Chancellor Mayes, and his chairmanship of the Committee on Bill of Rights in the Constitutional Convention in 1890 also deserve mention among the important events of his administration.

As an author, Dr. Mayes is entitled to additional distinction. Without enumerating his legal publications, it will be sufficient to refer to his valuable "History of Education in Mississippi" and to his admirable "Life, Times and Speeches of L. Q. C. Lamar."

That he was a delegate to the Methodist Ecumenical Conferences of 1891 and 1901 indicates his church relationship and the esteem and confidence entertained toward him by his church.

After his resignation of the chancellorship, Mr. Mayes was the attorney of the Illinois Central Railroad before the Supreme Courts. From 1895 to 1900 he was professor of law in Millsaps College, Jackson, Mississippi.

With a national reputation as a lawyer, Ex-Chancellor Mayes, for character, attainments and services, ranks among the most eminent of the sons of Mississippi. He was true in all the relationships of life, a most worthy exemplar for young men, a model teacher, an exceptionally able judge with a profound knowledge of the law.

His death occurred in Jackson, Mississippi, August 9, 1917. At that time it was recalled that he belonged to that truly remarkable body of men referred to in the following paragraph which is taken from a historical sketch of the University of Mississippi: "Immediately after the Civil War the halls of the University were filled with a class of students never before seen in any American col-

lege. They were the sons of parents who had been wealthy but whose wealth had been entirely swept away by the Civil War. Perhaps half of these young men had served in the Confederate Army. With such preparation for college as these circumstances suggest, they came with possibly as little of scholastic attainments as those students who entered in 1848; but they came with a determination born of necessity. The efforts put forth and the influence felt while here resulted in the development of a type of manly character and power which cannot be equalled by the records of any other American college. A study of the life work of this group of students fully verifies this strong statement as fact."

Alfred Hume,
Chancellor, University of Mississippi.

SUPPLY AND DEMAND IN LEGAL PROFESSION*

Factors Determining Proper Distribution of Lawyers —Higher Educational Standards and Supply of Practitioners—Probable Influx to Low Standard States from Those States Having Higher Qualifications—Labor's Attitude Toward Adequate Professional Preparation—The "Poor Boy" Argument and the Facts of Today—Normal Rule of Supply and Demand Not Operating.

By H. C. Horack
Advisor to the Council of Legal Education

Of the various elements which help to determine the proper distribution of lawyers, the two most obvious are the population per lawyer and the per capita wealth of the population. Multiplying the per capita wealth by the population per lawyer should give some index as to the desirability of locations for the practice of law. Admittedly, there are other elements that enter into the problem.

That educational qualifications generally have not been such in the past as to limit the number entering the profession, is suggested by the fact that the number of lawyers in the United States, on the basis of the figures used, population per lawyer times per capita wealth, is slightly lower than it is for the State of Indiana, which by constitutional provision places no educational restrictions, preliminary or legal, upon those who feel the call to practice law.[1] Indiana is the outstanding exponent of what has been called the "school of opportunity" as distinguished from the "school of fitness." In a presentation

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* Reprint from American Bar Association Journal.

* Presidential address delivered at annual meeting of the Iowa Bar Association, 1928. At the Seattle meeting of the American Bar Association the Council on Legal Education requested that this address be published in the Journal. The officers of the Section on Legal Education and the members of the Council of that section are as follows. Chairman, William Draper Lewis; Vice-Chairman, William A. Hayes; Secretary-Treasurer, John B. Sanborn; Council—Monte M. Lemann, Orrin K. McMurray, Guy A. Thompson, George H. Smith, John Kirkland Clark, Oscar Hallam, A. B. Andrews, Theodore F. Green.

1. On the basis of population per lawyer times per capita wealth, the following tables based upon the last census figures present the condition of the supply of lawyers in each state, treating the situation in the United States as normal or 100%. Whether this average for the United States represents an actual excess or a shortage in the supply of lawyers may be judged to some extent by viewing the situation in states having more or less than the average number of lawyers. Thus, if Iowa, having the fewest lawyers in proportion to its population and wealth, nevertheless appears to have an actual over-supply, it may be inferred that the situation here used as the norm, in fact represents a gross over-supply for the whole country. In column I is shown the proportion of the normal supply of

recently made to the New York Court of Appeals, Honorable John W. Davis thus described the two points of view for admission to the bar: "There are now," he said, "there always have been, I think, at the American Bar, two distinct schools of thought. There is the school of opportunity, which argues that the field must be left open to all aspirants and no barriers must be put in the path of the ambitious man. There is the school of fitness, which believes that he shall be qualified to render adequate service to his clients, to the courts, and to the public at large."

Surely nothing but the desire to enter other callings or the desire to make a living has kept down the number of lawyers in Indiana with a constitutional provision which broadly states, "Every person of good moral character, being a voter, shall be entitled to admission to practice law in all courts of justice." Although an attempt has there been made to secure voluntary examinations before County Courts, this has placed no serious limitation upon those wishing to enter the profession. The rule for admission to the bar in Indiana may still be described with fair accuracy as being, "Whosoever will may come." Entrance to the profession, like salvation, is free, though perhaps a somewhat larger number seek to avail themselves of the opportunity to join the bar.

In fact, the requirements for admission to the bar everywhere in the United States were at the time of the last census, when exact figures as to population and membership in professions were available, so low that in no

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lawyers possessed by each state; column II shows the normal number of lawyers to which the various states should be entitled, based on each one hundred lawyers actually listed:

	I	II		I	II
Iowa	.611	163	Vermont	1.028	97
Pennsylvania	.614	162	New Mexico	1.039	96
South Dakota	.618	161	Illinois	1.041	96
Wisconsin	.655	152	Virginia	1.053	94
North Dakota	.663	150	Nevada	1.067	93
Connecticut	.675	148	South Carolina	1.068	93
Kansas	.682	146	Montana	1.088	91
Rhode Island	.695	143	Oregon	1.094	91
New Hampshire	.700	142	Missouri	1.148	86
Delaware	.707	141	Idaho	1.152	86
Michigan	.719	139	Washington	1.154	86
Nebraska	.741	134	Alabama	1.220	81
Wyoming	.743	134	California	1.237	80
West Virginia	.750	133	Tennessee	1.239	80
Minnesota	.800	125	Florida	1.253	79
New Jersey	.887	112	Colorado	1.254	79
Utah	.909	110	New York	1.304	76
Louisiana	.910	109	Arkansas	1.335	74
North Carolina	.915	109	Mississippi	1.339	74
Ohio	.930	107	Maryland	1.381	72
Arizona	.950	105	Texas	1.430	69
Indiana	.966	103	Georgia	1.683	59
Massachusetts	.998	100	Kentucky	1.708	58
Maine	1.015	98	Oklahoma	1.876	53

state could they be said to constitute any serious barrier. With nothing more than a high school requirement for preliminary education, it cannot be supposed that many have been kept out of the profession who were able to cram for the simplest bar examination.

Since 1921, the year in which the American Bar Association recommended its standards for admission, two years of college work and graduation from a three-year law school course, eight states have adopted rules which approximate these standards, but as the dates fixed for these rules to become effective were advanced sufficiently so that the change might work no hardship upon any student, it can hardly be said that any general educational requirements have as yet been in force in the United States so as to restrict materially admission to the bar.

It is somewhat surprising to find that one of the objections that has been seriously raised to the adoption of the American Bar Association Standards has been that any restriction through educational requirements which might operate to reduce the number of lawyers to be admitted to the bar in the future, might result in a scarcity of lawyers, particularly in the small towns, and, as a consequence, deprive the poor man of cheap legal services. It has been assumed that this has happened in the case of the medical profession, and though careful investigations do not bear out this assumption, such fears with reference to the legal profession seem to be entirely unfounded.

That the younger physicians have tended to leave the small rural communities to establish themselves in the larger cities, particularly since their return from the war, seems to be apparent, but that higher educational requirements have of themselves had any direct influence upon this movement may be doubted. Perhaps a better training has tended to induce the newer generation of physicians to move to the vicinity of hospitals and laboratories, but of much greater influence has been the almost universal adoption of the telephone, the use of the automobile, and the building of good roads. The midnight horseback ride to call the doctor has already taken its place in history with the famous ride of Paul Revere.

Though the actual number of physicians admitted to practice during the past few years has shown only a slight increase, the amount of service rendered by each physician has shown an enormous increase. Today he takes care

of a score of patients at his office during the time that it took him in the horse-and-buggy days to make one call ten miles in the country. But, whatever may be the situation concerning the medical profession and the rural community, the marked tendency for the legal business to center in the larger cities can result in no harm to the small community, since legal service is seldom an emergency call and since the automobile has brought the client within easy driving range of the lawyer in the larger city or the county seat. This movement has nothing to do with higher educational requirements. Today the small town merchant, as does the lawyer and the doctor, looks out of his window to see the business which formerly came to him, speed by on the paved highway to the city some twenty or thirty miles away.

In an advertisement which appeared in the Saturday Evening Post some months ago the situation is thus stated: "The horse and buggy days *are over.* Good roads and the automobile . . . have merged farm and city markets into one. Main Street is lined with farm cars day and night. In Springfield, Illinois, today's trading radius extends thirty miles. . . . They live in the country, but they shop in town."

In discussing the supply of lawyers as compared with the number of physicians required for the community's needs, a striking difference should be noted. The lawyer serves the family as a unit, while the physician serves the family as individuals. When we speak of the "family physician" we mean one who takes care of *all members* of the family, and in every family every member thereof is a probable and perhaps an actual patient each year.

Some time ago this question was addressed to some twenty students: "Who is your family physician?" to which in every case a very definite answer was received, while to the similar inquiry, "Who is your family lawyer?" there were such replies as, "We don't have any," "I don't know," "I think father goes to Mr. Blank, if he ever has any legal business." The last answer perhaps presents the situation most accurately. Many families have seldom come in contact with the law or needed the services of a lawyer, while any law business done is transacted by the head of the household. Population figures are of absolute importance in estimating the community's need for physicians, for the least members of the family may need his services the most, and every person, rich or poor, is a potential patient, while the family, rather than

the individual, is the more accurate measure upon which the supply of lawyers should be estimated. In the legal profession, not every individual, nor even every family, is a possible client, for many families have no occasion to consult a lawyer, while some who have legal business now transact it through the family banker.

Taking the normal family of five as the unit, the average for the United States is one lawyer to 172 families, a very small community to be called upon to support a lawyer, even in a style to which he will have difficulty to become accustomed. What must happen to the rest where one lawyer gets more than his share! With only 172 possible clients each, certainly no state need call upon its neighbors to send in their surplus supply of lawyers, yet, invited or not, it must look forward to an influx from other states where requirements for admission to the bar soon to be effective are higher than its own.

As to the effect of higher education upon the price of legal services, every lawyer knows that the poor lawyer charges for his services on a basis that is not only exorbitantly high considering the value of the service rendered, but the charge is often much higher for any specific service than that made by the lawyer of good standing. Unfortunately it is the poor man or the person inexperienced in business, the widow or the orphan, who is called upon to pay.

Solutions must be offered for the problem of adequate legal services for the poor other than the fallacious reasoning that cheaply trained lawyers will render cheap legal services to poor people. Real progress is being made in this direction. There is much legal business among the poor which cannot justify any charge whatever for professional services. There must be no wrong without a remedy. This remedy must be not merely a theoretical right to come into court, but a practical relief to the poor man for the situation which confronts him. Small claims courts and legal aid organizations offer much more promise of relief than do cheaply and poorly trained lawyers.

Another phase of the objection that the poor man's interests might be affected by raising the educational requirements for practice of the law, has been by way of a political threat. Many legislators and judges have been somewhat intimidated by the suggestion that Labor would not take kindly to the establishment of higher educational standards. But organized labor stands squarely for the

requirement of adequate preparation for every calling. It can hardly be supposed that it would refuse to the legal profession the right to determine what are reasonable minimum standards for this calling, and any suggestion that Labor has taken a stand against higher educational requirements for the practice of law should be treated as unauthorized until the contrary is shown.

In discussing the American Bar Association Standards, President William Green of the American Federation of Labor says in a recent letter:

"Because of the very high and honorable profession represented by the American Bar Association, I realize that reasonable minimum standards should be met by those who seek to qualify for admission to the bar. At the same time the widest opportunity possible should be accorded those who possess mental and moral qualifications but whose circumstances make it very difficult for them to meet educational requirements.

"While I hesitate to express an opinion regarding the fairness and practicability of the minimum standards, I am confident Labor is in accord with the efforts of the Bar Association to protect the legal profession against the admission of people who are unworthy to enter the legal profession. We wish to co-operate with you in the furtherance of all reasonable and practical means which may be employed in the accomplishment of this purpose."

Whenever any political threat is made against raising the educational standards for admission to the bar, let us first find out whether there is behind it the authorized representative of Labor, or merely some lawyer who, for whatever reason, wishes to defeat the movement.

Having considered the apparent over-supply of lawyers and the possible effect upon the public of educational requirements which might tend to reduce the number, let us now consider the effect upon the young men entering the profession.

The most urgent plea made has come to be known as "The poor boy argument." Everyone is most desirous that no action should be taken which might bring undue hardship upon the poor boy so as to deprive him of his chance to become a lawyer. This argument, however, has been made by two widely different groups. One very active source of opposition has developed in commercialized schools that seem to fear that higher educational requirements may result in a diminishing number of stu-

dents who might be induced to study law, and that many prospective law students, after having taken two years of college work, might not seek the commercialized type of law school in which to secure their legal training.

Another more serious source of opposition comes from many of the older lawyers who have themselves achieved their measure of success without college training, and point to the cases of exceptional men who have gained recognition at the bar or in public life. The statement is often made that these educational requirements would have barred Abraham Lincoln.

It is hardly necessary to call your attention to the enormous change in educational opportunity which has taken place since Lincoln's day, or even since the time when all but those who would be classed as the younger members of the profession were admitted to practice. Yet the figures showing the growth of college attendance in America are so remarkable that they deserve special attention.

In 1890 the total number of students in collegiate departments was 65,274; in 1900 it had increased to 104,098, a gain of almost 60 per cent; in 1926 the numbers had mounted to 595,458, a gain of 472 per cent since 1900, and a gain of 812 per cent since 1890. For the six-year period from 1920 to 1926 the average yearly increase alone was 42,396, or almost 65 per cent of the total collegiate attendance in 1890.

These attendance figures, taken from the last report of the United States Bureau of Education, do not include students in preparatory departments, graduate or professional colleges, but only those taking strictly collegiate work.

During the period from 1890 to 1926 the population gain in the United States was only 86 per cent, while the collegiate attendance gain was 812 per cent, growing at a rate almost 9½ (9.44) times as fast as the growth in population. Yet this enormous proportional gain has taken place during a period when America was seeking to assimilate immigrants in unrestricted flood, pouring in at the rate of a million per year. One would hesitate to prophesy what will be the effect upon future college attendance of a restricted and selective immigration law, with a resultant increase in the proportion of American-born children.

There are no accurate figures of college attendance for Lincoln's day. In 1828, one hundred years ago, he was nineteen years old, an age when the boy of today is in college. A judgment of the present educational opportunities by the conditions of Lincoln's day is a judgment that is somewhat more than one hundred years behind the times. There are today more than one thousand institutions of learning in America that offer two years or more of college work. A comparison with the educational opportunities and conditions of Lincoln's time is as inept as a comparison of distances as judged by the means of travel of the two periods.

Adversity has ever been considered a great character builder, but each generation furnishes its own type in sufficient quantity so there is no need to add to it the handicaps of a period that has passed into history. With plenty of obstacles to be overcome, it is as unfair and unnecessary to permit the young lawyer of the present day to carry on with the education of a former period as it would be to make him study by the light of a pine knot or do his figuring with a piece of charcoal on the back of a shovel.

What of the boy whose parents cannot afford to send him to college? Many tears have been shed over him. But in the quarter century in which I have been engaged in educational work, I have known no boy of ability and determination, the kind that any lawyer would say is needed in the profession, who has not been able to take care of his education, and who does not glory in his independence in doing so. This is the type of young man who gives assurance that this country will be made safe for democracy.

It is the spirit of the American youth today that he prefers to make his own way. It is a great adventure, and I have yet to see the young man who has felt embittered because of it. The interesting fact is that many are contributing the greater portion of their college expenses, even against the wishes of parents who could afford and would prefer to send them through school without any contribution being made by the boy himself. It is hard for those who are not directly concerned with educational work to fully understand the spirit of the Amercan college youth.

During the past winter authorities of a middle-west university were called upon to investigate the activities

of a certain student. The father, a mechanic in one of the great industrial centers, had let his son come to the university to get an education, with the expectation that the boy should earn part of his way through college. At the end of the first month the father sent such portion of his wages as he could spare, and the boy returned all but five dollars. This continued each month, the boy never keeping more than five dollars of the sum sent to him, until the father became worried for fear that he might be suffering by depriving himself of the necessities of life.

Upon investigation the boy was discovered to be waiting table for his board, and doing such outside work as took care of his room rent and incidental expenses, happy and independent, and having no intention whatever that the burden of his education should come upon a father who had a family of younger children to support. Such young men fill places of honor in the university and need no one's sympathy.

In a recent hearing before the New York Court of Appeals, a young lawyer who had made his own way through college and law school said of his experience, "It is a thing which I would not want to give up for anything. . . . It is a strengthening experience, it is a thrilling experience. I do not believe that any boy of capacity and determination will fail to accomplish it if he sets out to do it, and I am sure that no boy who does accomplish that task will ever forget it or will ever regret it."

The case of the boy who is entirely self-supporting is not an unusual one. In an investigation of over sixty colleges connected with the law schools approved by the American Bar Association, figures and estimates furnished by university officials show that in every part of the country, in large cities and in universities located in small towns, on an average about 10 per cent of the entire student body is completely self-supporting. On this basis some 60,000 young people are now paying their own way through college. This is nearly one and one-third times the total number of students now studying law in all the law schools of America. An additional 30 per cent, at least, or about 180,000 more, furnish the major portion of the cost of their college education. These students form a group one-third larger than all the lawyers now in the United States. The further number who contribute a very substantial part of their expenses is not inconsiderable.

The American Bar Association in its recommendations has also made provision for the cases of great individual

hardship which might prevent a young man of native ability from attending college. It has recommended that the State University or the Board of Law Examiners be asked to give to all who apply, examinations in the first two years of the college course, which, if successfully passed, should be accepted as the equivalent of work done in college. However, college education is now so general that, in states already having this provision, very few have sought to take advantage of it. It is much more desirable that an exception be made for the individual, rather than that a general rule be made on the basis of the exceptional cases.

Yet even today there is the well-meaning person who fears that putting up reasonable educational requirements may deprive the poor boy of his chance to become a lawyer, or that by insisting upon educational qualifications, the profession of the law may become undemocratic. The youth with ambition is everywhere capably taking care of himself, and we have listened too sympathetically to the unambitious boy who apologizes for his failure by assuming that he has not had a chance to succeed, he's "had no show," when in fact, like Joe Beal, he has only been "too patient."

Joe Beal 'ud set upon a kaig
Down to the groc'y store an' throw
One laig right over t'other laig,
An' swear he'd never had no show;
"Oh no," said Joe,
"Hain't hed no show."—
Then shift his quid to t'other jaw,
An' chaw, an' chaw, an' chaw, an' chaw.

He said he got no start in life,
Didn't get no money from his dad,
The washin' took in by his wife
Earned all the funds he ever had;
"Oh no," said Joe,
"Hain't he'd no show."—
An' then he'd look up at the clock,
An' talk, an' talk, an' talk, an' talk.

"I've waited twenty year,—let's see—
Yes, twenty-four, an' never struck,
Altho' I've sot roun' patiently,
The fust tarnashion streak of luck.
"Oh no," said Joe,
"Hain't he'd no show."—
Then stuck like mucilage to the spot,
An' sot, an' sot, an' sot, an' sot.

"I've come down regerler every day
For twenty years to Piper's store;
I've sot here in a patient way,
Say, hain't I, Piper?" Piper swore,
"I tell yer, Joe,
Yer hev no show,
Yer too dern patient."—ther hull raft
Jest laffed, an' laffed, an' laffed, an' laffed.[2]

We must put aside our preconceived ideas and consider the situation as it confronts the profession today. We are no longer a pioneer country. Our government is now among the oldest in the world, and more young people are now attending college in America than in all the rest of the world put together.

It has always been difficult for the older generation to realize the changes that have taken place, or be persuaded that the conditions that resulted in success in the past are not now sufficient. Back in 1875 Will Carlton presented this situation under the title of "The Schoolmaster's Guests":

"We've come here, schoolmaster, intendin' to cast an inquirin' eye 'round,
Concarnin' complaints that's been entered, an' fault that has lately been found;
To pace off the wedth of your doin's, an' witness what you've been about;
An' see if its payin' to keep you, or whether we'd best turn ye out.

"The first thing I'm bid for to mention is, when the class gets up to read:
You give 'em too tight of a reinin', an' touch 'em up more than they need;
You're nicer than wise in the matter of holdin' the book in one han';
You turn a stray *g* in their doin's, an' tack an' odd *d* on their an'.
There ain't no great good comes of speakin' the words so polite, as I see,
Providing you know what the facts is, an' tell 'em off just as they be. * * *

"Then, also, your 'rithmetic doin's, as they are reported to me,
Is that you have left Tare an' Tret out, an' also the old Rule o' Three;
An' likewise brought in a new study, some high-steppin' scholars to please,
With saw-bucks an's crosses and pot-hoots, an' *w*'s, *x*, *y*'s and *z*'s.
We ain't got no time for such foolin'; there ain't no great good to be reached
By tiptoein' childr'n up higher than ever their fathers was teached."
And the other four good district fathers gave quick the consent that was due,
And cocked one eye up to the ceiling, and said, "*Them's our sentiments, tew.*"

Lawyers and laymen have been fond of quoting the statement of Dick the butcher from Shakespeare's "Henry VI," "The first thing we do, let's kill all the lawyers." Yet it appears that the offensive thing was not so much being a lawyer, as it was in being educated, for when the

2 Foss, Back Country Poems, "No Show."

Clerk of Chatham was brought before Jack Cade and his followers, the charge was that he could "write and read and cast accompt." And on this charge he seems to have been tried and convicted, for Cade asks him, "Dost thou use to write thy name? or hast thou a mark to thyself, like an honest plain-dealing man?" To which the Clerk replied, "Sir, I thank God, I have been so well brought up that I can write my name." All exclaim, "He hath confessed: Away with him! He's a villain and a traitor." There being no other course open in such a clear case, Cade passed judgment upon him, "Away with him, I say! Hang him with his pen and ink-horn about his neck."

No longer is it a crime to be an educated lawyer, but to require the lawyer to be educated is still considered by some as evidence of criminal intent!

The young man expecting to enter the legal profession needs aid and counsel. Too easily does he draw the conclusion that the educational requirements and conditions that enabled an older practitioner to attain success are sufficient to assure him success. He must be helped to realize the competition that exists and the preparation that will best prepare him to enter it. A large portion of young men are today entering the profession with the best training that modern educational facilities afford. Competition with the older lawyer with the experience and training which he has acquired over many years is hard enough to meet, but the young lawyer should stand on a somewhat equal footing with those who are entering the profession with him, and he should be at least as well educated as will be a large portion of the clients who will come to him.

It is much to the credit of the profession that it has never sought to limit its membership for any selfish purpose. But this unselfish attitude, commendable as it may be, does not meet the responsibility which the profession owes not only to the public but to the young men who are admitted to the bar.

We have recognized but one type of lawyer in this country. Once licensed to practice, he may attempt any and every kind of legal business that may come his way, regardless of his preparation, training or experience. Perhaps this is as it should be, but the standard established should be one which is fairly in accord with present conditions.

Little effort has been made to determine what is and what is not the practice of the law. We object to banks

and trust companies drawing wills, deeds, and mortgages and settling estates, while in many a small town the attorney-at-law in his office over the bank frankly announces his interest in Loans, Insurance, Real Estate and Collections. We have even congratulated ourselves on the fact that these feeders may keep the young lawyer alive, and thus hold him to the more moral course of not robbing his client.

We are turning into the stream more than its banks can hold. So severe is the competition for business in many communities that the settlement of estates and many other items of law business are practically let out to the lowest bidder, and much work is done at charges that are less for the time involved than the wages received in many of the common trades.

Do we not have some responsibility for those who, under the economic and unprofessional conditions which we persuade them to enter, fall from grace and engage in unethical practice? Is this what we mean by giving the poor boy a chance? Is this what we mean by making the law a democratic profession?

In every discussion of this subject some lawyer declares himself for high standards in these terms, "Give them," he says, "a good stiff bar examination and fail everyone that doesn't make 75 per cent." But very few bar examinations have been devised that a bright young man who crams intensively for three months cannot pass. Cramming and training are different matters, as every teacher knows. This is recognized in the rulings of the Council of the American Bar Association on Legal Education and Admissions to the Bar, in their refusal to approve any school that "as a part of its regular course conducts instruction in law designed to coach students for bar examinations." Are we to go on indefinitely substituting merely a bar examination for training?

The day of office preparation has passed. A member of a state board of law examiners made the assertion that in over ten years, of the many applicants that had come before him to take the bar examinations on the basis of study in an office, there was not among them one bona-fide case of *office study*. Most of them were young people working in some stenographic or clerical capacity, who had studied a little law *outside* the office and finished up with a short cram course in preparation for the bar examinations, while some had never been in law offices at all,

but were furnished the necessary certificates by accommodating lawyer friends.

Are the normal rules of supply and demand operating to control the number who seek to enter the legal profession? Perhaps the answer may be inferred from the figures presented by the Carnegie Foundation which show an increase from 24,503 to 45,301 in the number of students attending law schools in the six-year period from 1920 to 1926, a gain of over 80 per cent, two-thirds of them attending schools that require no college work for entrance. During this same period, while the population gained only 10 per cent, the number of lawyers increased over 30 per cent. There are today about 50,000 persons studying law. Through some hope to use their legal study as an aid in business, there is a steadily growing number asking admission to the bar.

Why do all these young men wish to enter this overcrowded and under-paid profession? It is the one learned profession that does not require learning for admission to it. Even the churches now require that a young aspirant should receive his call from the Lord only after he has adequately educated himself to properly fill the position which he seeks. Only the law offers an attractive field for the man who feels the appeal of a white-collar job, where he may live by his wits, and have the label of a dignified profession. A young man, asked by a member of the board of law examiners why he desired to enter the law, naively stated, "It looks like easy 'jack' to me!"

If no state were taking a stand to weed out the untrained applicants who may become a tax upon and a menace to the whole profession, the question might be left for future solution. But already eight states have announced standards that require adequate preparation. What will become of the army of young men who are barred by these states from easy entrance into the profession? It may be expected that many will go to states which still offer "a good stiff bar examination" as the substitute for thorough study and careful training.

A number of states with low standards for admission to the bar believe they can already discern a movement to their schools of an undesirable class of students who are now being driven out of the larger centers where the state has taken a stand for higher requirements.

Education will not make all members of the profession conscious of their ethical obligations, and much work re-

mains to be done by character committees in testing the moral qualifications of applicants, but a higher educational requirement will sort out some who abuse their license because unfitness makes economic conditions bear heavily upon them, it will sort out those who go into the law merely because it is the easiest profession to get into. It will assure the public of better legal service, and, incidentally, it will give to a government that has always relied heavily upon lawyers, a higher type of public servant.

It is pleasant to pass resolutions stating the stand that is taken for a higher type of professional membership, but the situation calls for immediate action in the responsibility which the profession owes to itself, to the public, and to the young men who seek to enter the profession of the law.

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THE NEED OF A COMMISSION ON JUDICIAL PROCEDURE

By T. C. Kimbrough

In a brief discussion of the need of a Commission on Judicial Procedure, the commission to be created by legislative act, given all necessary powers to function properly, it is proposed to show: (a) that procedure in our courts is necessarily, from one standpoint, a question of vital interest to the public; and (b) any well-defined relief to the public in this respect, can only be obtained by a select body or group of men who by training, study, and long experience with courts are capable of attacking and dealing with the problem in a scientific and effective way.

However we may think of procedure in our courts, it is distinctly a public institution. It was created to serve not certain individuals, but the public. This may appear but the simple statement of an obvious truth, and this may be so. But there exists many good reasons to emphasize this truth when we are confronted by mistaken beliefs on this point, which have prevailed through the years.

A cause of action before it becomes a case in court is purely a private matter, with which the public has but slight concern. But a very small fraction of the general public is affected by facts constituting the case. It is on the same footing, so far as the public is concerned, as the thousands of other private matters the general citizenship of the state are but indifferently interested in. This case, the individuals involved may settle and adjust as they please, so long as the rights of the public are not trenched upon. The public is but seldom interested in the settlement of the controversy, be the amount great or small.

An entirely new situation arises if this same controvery becomes, by proper procedure, a case in the courts. The new element which has entered into the equation is quite independent of the material circumstances forming the basis, or ground work of the case. In the new situation there is a court. This court consists of a judge and the usual court officers provided by statute. This court—the judge and officers—as representatives of the public, is an essential factor now in the settlement of the case. The case to be tried at once assumes a public character, how-

ever much it may in fact deal with legally private matters.

The new factor which has been introduced assumes an immense importance. It becomes all important in the case.

At one stroke it does away with the notion of private arbitration and substitutes therefor the rules of legal procedure. In this new situation there is no such thing as liberty of private settlement; if it were permitted, it might upset the legal machinery of the state and render her aims and objects useless.

We now come face to face with the practical assumption that a law case is not merely a private, but essentially a public matter. It follows necessarily from this that its whole structure must be decided not on the basis of a private whim or the arbitration of the interested parties, but the public itself, through its legally ordained and established agency, in conformity with the practical end it serves and with the social function it fulfills.

It is the vehicle by which it is sought as easily, surely, and speedily as possible to assist individuals to secure their legal rights. Anything that will facilitate this purpose is worthy of recognition and approval; anything that hinders and delays should not be tolerated.

To illustrate, suppose the parties to the case are given free rein—the liberty—to continue the case as it suits their whim or caprice. Experience shows such would only bring about endless, needless and costly delay, and consequently the liberty granted, instead of producing the end desired, namely, a speedy trial of the case, acts more as a hindrance, and for this reason should not be permitted. If the man who enters into a contract, or creates a debt, is granted the privilege of waiving the legal proceeding when hailed into court in order to compel him to perform his contract, or have judgment rendered against him, what evils and confusion would follow in the business world.

When we thoughtfully and carefully consider the fundamental purpose and object of procedure we must be brought to realize that its object is not in itself, but is purely a means to an end; namely, the consummation of justice as between the litigants, and that, too, most speedily.

The student conceives, upon a due consideration, the contrast between procedure and substantive law, but must be forced to observe this profound organic connection between them—that procedure is and can never be anything more than the agency, the servant, if you please, of speedy

and effectual justice, whose value will depend solely upon how satisfactorily procedure can fulfil its function and duties in this humble role. When we consider, however, the object and purpose of law is to safeguard the interests of society, this role becomes by no means an unworthy or insignificant one.

In order that procedure may most efficiently and properly fulfill its purpose and role it is not enough alone that the rights retained by litigants should not clog or hinder its normal functions.

It is imperatively necessary that each individual link in the procedure adopted by the courts be so arranged that it becomes as perfect an agency as possible for the speedy consummation of justice. In fact, the public should demand of the courts, their representatives, that the most speedy procedure consonant with orderliness and efficiency be adopted.

The public, in the creation of the rules of procedure adopted by the courts for the consummation of justice, as a whole, has but a small voice. The layman, however well trained, expert and learned he may be in the sciences, or in his particular field of endeavor, would not dare suggest a change in the rules of procedure.

The unlearned layman would not even make a suggestion. It follows, naturally, that any change to be made in procedure must come from the trained jurist. This is his particular field and to him, and him alone out of the whole social group, must the public look for reform in legal procedure. If he cannot bring it to pass it will forever remain unaccomplished.

If we could briefly express what might be said to be the prime need in our procedure in this day and time, it might be compressed into the one word *simplification.* All unnecessary technical rules, or precepts, the products of former ages and times, but now wholly at war and antagonistic to the spirit and genius of the present time, should be ruthlessly uprooted and eliminated. It is a reflection upon the legal profession, to whom the public must necessarily look for relief in the matter of procedure, that it permits many formalities in procedure which are truly not necessary, but are quite harmful in preparing pitfalls in the way of the establishment of true justice. They often tend to confuse rather than clarify issues. The lamentable result of the superfluous and intricate unnecessary procedural steps, and the equally superfluous written matter, is that many cases are prolonged to an unconscionable

time. This one fact, if nothing else, should deal a death blow to any attempt to justify such procedure. It should be regarded as equally important, for the most part, that the trial of a case be speedy, as well as just. The want, or lack, of speed often works gross injustice and hurt to the individual and to society.

If an individual goes into the courts to recover his horse, or other animal, there is not much satisfaction in winning the case if the action is settled only long after the animal is dead, and costs in the meantime have piled up far exceeding the value of the property constituting the subject of the action. Or if a man is injured in his person or property, and seeks damages, as he has a right to do, it will be of but little more than theoretical value to him if he must wait for years before being awarded a just compensation.

In the active and aggressive business life in which we now live, enormous damage may accrue, both to the individuals concerned and economically to the state, by sluggish procedure. The business of individuals, trust estates, great corporations, both private and public service, may find their business and their activities crippled by procedural delays to the lasting hurt of individuals and society.

The burden of the many economical difficulties with which business men and business interests have to struggle cannot but be greatly increased by delays of this sort.

What I have had to say up to this point applies largely to civil procedure. If we turn to the criminal side of the docket, on every hand, wherever we turn, complaint is heard by the public at what is termed "the law's delay" in criminal cases and the resulting hurt to society in the way of comfort and encouragement thereby given to the great criminal element in the body politic. The charge that sluggish and antiquated rules of procedure are wholly responsible for the unprecedented growth of the criminal class may be exaggerated to some extent by laymen and the lay press, but every keen observer, even among jurists themselves, must admit the criminal class is encouraged by the law's delay largely occasioned by a procedure that fails to speed up trials of criminal cases and bring them to a finality.

To a considerable extent, our rules of procedure are the product of the civilization, and conditions existing at the particular time they were adopted. Some of them are

the products of the wheelbarrow and horse-and-buggy age of the government.

They, to some extent, were conceived and molded under the influence of the habits, customs, and modes of business and life of a generation very different from that of today. It is my belief that the procedural features of the law has not kept pace with the progress and development of the substantive law, nor our rapidly changing civilization and modes of life. Substantive law has adjusted and adapted itself to the changed conditions. Unfortunately, the procedural law has not fully done so. Criminalists have some just cause of complaint at the hurt society receives from this source.

Certainly it is not too much to expect of the jurists of this and other states that they, with patience, the application of wisdom and common sense, will be able to work out necessary reformation of the procedural law so that criminal and civil trials may be had with the speed and efficiency commensurate with the age in which we live.

Years ago in the history of this state, when the real fight of the lawyer was not to try the merits of the case, but to get into court and stay in, on the then procedure, when some one advocated a simplifying of the rules of procedure, an old gray-haired lawyer, a product of the times, vigorously dissented on the ground that it would destroy so much law and learning. From the earliest days of the English judiciary, forms and procedure have, in the minds of most jurists, assumed a position of sacredness, and therefore should not be touched by the unholy hands of the reformer.

But it is the part of wisdom, when all about us is in a condition of flux and change, to cling tenaciously to all procedural law, and not by the use of common sense make the changes necessary to the proper functioning of courts of justice and the good of society.

A great many wise changes by statute and rules of court have been effectuated by the great lawyers of our state, but the legal pruning knife must cut deeper and destroy the now practically useless and slow-moving procedure of a civilization long past. The criminalist ought not to be in a position to point to the law and say, "Your sluggish procedural machinery is working a positive hurt to society." There must be wisdom and courage sufficient among those learned in the law to wisely and orderly bring into existence such changes in procedure as are reasonably

necessary to relieve the present situation and to the proper functioning of the courts.

When we turn to the other learned professions and note the progress made in the last quarter of a century, one is almost astounded. How has it been brought to pass? Has it been accomplished in a haphazard way, or is it the product of a systematic effort on the part of a well-organized body of wise and thoughtful scientists. I cannot agree that the wonderful results are the fruit of ill-directed efforts. It is necessarily the result of an efficient and systematic plan of an organized group of individuals.

The effect of the lingering shreds of ancient procedure now clogging the wheels of the courts can not be remedied by the efforts of individuals, although, I confess, much has been accomplished through the years in this way. It was done, however, only by the dogged tenacity of the particular individual. We in this state owe a great deal to Judge V. A. Griffith of the Coast Chancery District, now on the Supreme Court, who, acting almost singly and alone, has brought about many necessary reforms in the chancery practice—all looking forward to the speeding up of trials and a more economic administration of the equity courts of the state.

We cannot hope for much from the legislature's acting alone. But few men who are elected as members of the legislative body specialize in procedural legislation. It is often the case that legislative reforms in procedure are experiments, and sometimes very costly ones. It is too much to expect of a legislative body that it work out of itself great reforms of this nature. Such reforms must be the result of scientific thinking of men learned in the science of legal procedure. Men who have weighed and thought through the problems of procedure confronting them. Men who possess a peculiar fitness for the work by reason of their experience, learning, and training in this particular field of the law.

The immediate problem, therefore, facing the legal profession in the state today is, by what plan may we most effectively relieve the courts of procedural details which cause their work to be often tediously delayed, inefficiently performed, and expensively conducted.

In some of the states, legislative restriction upon the courts in procedural matters are guarded against by insuring to the judiciary the rule-making power by legislative act or by constitutional provision. It is claimed this plan

has worked well where tried, and that the efficiency of the plan is demonstrated by a decided decrease in the delay of the court's work and the elimination of many unwieldy procedural handicaps. Some states, however, take the view that in order to confer upon the courts the rule-making power it is necessary to make constitutional amendments specifically giving such power. The basis for this idea is that the Legislature, as one of the three separate departments of the government, cannot of itself confer such powers.

Happily for us, we are no longer required to grope about in a field of mist, conjecture, and uncertainty as to whether a commission or a supreme court may not be clothed with ample, if not plenary rule-making powers, subject only to a possible recall by the Legislature. The case of the *State of Washington, ex rel. Foster-Wynne Lumber Co. vs. the Superior Court of King County* (June 6, 1928: Washington Decisions, Vol. 47, No. 13), the statute conferring rule-making power was upheld in a decision of the Washington Supreme Court which is applicable generally to the constitutional questions likely to arise in other jurisdictions. The Washington Act covers both civil and criminal procedure. This case grew out of a rule of procedure made by the Supreme Court of the state exercising its powers as a rule-making body under the following legislative enactment: "An act to promote the speedy determination of litigation on the merits and authorizing the Supreme Court to make rules relating to pleading, procedure, and practice in the courts of this state.

"Sec. 1. The Supreme Court shall have power to prescribe from time to time, the forms of writs and all other process, the mode and manner of framing and filing proceedings and pleadings: of giving notice and serving writs and process of all kinds: of taking and obtaining evidence: of drawing up, entering and enrolling orders and judgments: and generally to regulate and prescribe by rule the forms for and the kind and character of the entire pleading, practice and procedure to be used in all suits, actions, appeals and proceedings of whatever nature by the Supreme Court, Superior Courts and Justices of the Peace of the State of Washington. In prescribing such rules the Supreme Court shall have regard to the simplification of the system of pleading, practice and procedure in said courts to promote the speedy determination of litigation on the merits.

"Sec. 2. When and as the rules of courts herein authorized shall be promulgated all laws in conflict herewith shall be and become of no further force or effect. Laws of 1925, Ex. Ses. 1 187 (Rem., 1927, Sup., ZZ 13-1 et seq.)."

The court, in discussing the point raised that the powers conferred by the act are purely legislative and therefore cannot be delegated to any other tribunal, says: "While it is true the Legislature has functioned in such capacity ever since statehood, there is still excellent authority, from an historical as well as legal standpoint, that the making of rules governing procedure and practice in the courts is not at all a legislative, but purely a judicial function." The court then quotes from the opinion of Chief Justice Marshall in the case of *Wayman vs. Southord,* 10 Wheat 1, where the court had occasion to construe its powers to make rules governing execution under the 17th Section of the Judiciary Act of 1789. Judge Marshall said: "It will not be contended that Congress can delegate to the courts, or any other tribunals, powers which are strictly and exclusively legislative. But Congress may certainly delegate to others, powers which the Legislature may rightfully exercise itself. . . . The courts, for example, may make rules, directing the returning of writs and procedure, the filing of declarations and other pleadings and other things of the same description. It will not be contended that these things might not be done by the Legislature, without the intervention of the courts: yet it is not alleged the power may not be conferred on the Judicial Department." Again, in the case of *The United States Bank vs. Halstead,* 10 Wheat 51, said the court: "Congress might regulate the whole practice of the courts, if it was deemed expedient so to do: but this power is vested in the courts: and it has never occurred to anyone that it was a declaration of legislative power." Concluding the discussion on this point, the Washington Supreme Court says: "We think it follows that the Legislature, although formerly functioning in this state as the source of rules of practice and procedure in the courts, did not, in so doing, perform an act exclusively legislative, and may, if it so desires, transfer that power to the courts without such act being a delegation of legislative power."

The legislatures of five other states have recently transferred the rule-making power and duty to the courts, namely, Delaware, Connecticut, Virginia, Colorado, and New Jersey as far as her constitution would permit, and

information is at hand that the Bar Associations of several other states are organizing to bring to pass the same results in their respective states.

If the rule-making power may be transferred to, or conferred upon, the courts of the state by the Legislature, without any constitutional provision authorizing it, there seems to be no sound legal reason why the power may not be transferred to a tribunal or commission consisting of lawyers and judges, rather than the Supreme Court.

It is the business of the Legislature to determine the policy of the law. The detailed method of executing the policy is embodied in rules which are made by a non-legislative body. These rules have all the force of law. There are few states in which there is no administrative board which possesses rule-making powers, and in many states, and especially in the federal government, such boards are common. The rules made by these bodies are rules of law, reviewable on constitutional grounds by the courts, and revocable arbitrarily by the Legislature.

The matter of a rule-making commission is not at all a new one in this state. The Legislature of this state at the 1920 session created a commission, composed of the Chancellors and Circuit Judges, charged with the duty of formulating and promulgating a code of rules of practice and procedure in the Circuit and Chancery Courts. (Laws of 1920, Sec. 2, Chap. 115.)

This act was reviewed by the Supreme Court in the case of *International Shoe Co. vs. Garfinkle,* 112 S., p. 168. The court, in discussing the rule-making power of the Legislature, said: "The Legislature by direct enactment has the power to prescribe rules of pleading, practice and procedure in the courts in order to facilitate the administration of justice: or the Legislature may set up a commission as provided by Sec. 2, Chap. 115, of the laws of 1920, with authority to adopt and promulgate additional and supplementary rules governing the practice and procedure in the courts. The only limitation upon the power of the Legislature to make such rules by direct enactment is the organic law. The Circuit and Chancery Courts of this state are constitutional courts. The Legislature is without power to enact rules of practice and procedure which would unduly hamper or impair the administration of justice in such courts. But within that limitation the power of the Legislature to enact statutes governing the practice and procedure in the courts is undoubted. Like-

wise the power of a rule-making commission for the courts, set up by the Legislature for that purpose, is amply established by the authorities. The only limitation on such rule-making power is that the rules adopted by the commission must not run counter *either to the organic law of the state or to the pleading and practice statutes enacted by the Legislature,* and in addition, must be reasonable and just, and calculated to facilitate the administration of justice in the courts." This section was again passed on by the court in *Kline et al. vs. Sims et al.,* 113 Southern 190, the court adhering to its views in the *International Shoe Co.* case.

The purpose of Sec. 2, Chap. 115, Laws of 1920 was to set up a commission to formulate and promulgate rules of a minor nature supplementary to and not in conflict with the pleading, practice, and procedure acts of the Legislature. The Legislature never intended by this act to clothe the commission with such powers as given by the Legislature of the State of Washington as set out in the act of its Legislature *supra.* Sec. 2 of the Washington Act provides, "When and as the rules of courts herein authorized shall be promulgated *all laws in conflict therewith shall be and become of no further force and effect.*" In other words, the rules made by the Supreme Court of Washington, if in conflict with any existing acts of the Legislature dealing with pleading, practice, and procedure in the courts of the state is in effect repealed by the rule of the Supreme Court. We have here a complete surrender on the part of the Washington Legislature of its rule-making power to the Supreme Court. The Mississippi Legislature did not make a complete surrender of its rule-making powers and thereby give to the rules promulgated by the commission such force as laws as to render all pleading, practice, and procedure acts in conflict therewith of no force and effect. This it could have done just as the Legislature of Washington did.

The Judicature Act in England in 1873 gave the rule making powers of Parliament and the courts to the whole court. This did not work effectively. In 1876 they changed it and transferred it to a rules committee of six judges. In 1899 a change was made to four judges, two barristers and two solicitors. The committee meets formally two or three times a year, and has informal meetings oftener. All classes of the public at large are encouraged to submit suggestions for improvement.

This committee has all the power of Parliament and the courts, subject only to the power of the Lords and Commons to nullify any rule promulgated by them. Since 1873 not one rule has been nullified. The ease and speed with which judicial trials, civil and criminal, are disposed of in the English courts, the practical and economical administration of the courts, justily excites the admiration of jurists everywhere. The secret of the efficiency of the English courts is attributable to the rule-making committee, small in number, flexible and clothed with ample powers.

In quite a number of states, Judicial Councils have been organized by legislative act and given advisory powers only, their duty being to make "a continuous study of the organization, rules and methods of procedure and practice of the judicial system of the state, of the work accomplished, and the work produced by the system, and its various parts, business expedited, and justice better administered." They are given the power to require all Chancery and Circuit Judges in the state to make a detailed report at least twice each year to the council of the business in their courts, how expedited, etc. Their reports are made on forms prepared and submitted to them by the council.

Massachusetts, Ohio, Oregon, North Carolina, Kansas, and South Dakota, and possibly one or two other states, have adopted the foregoing plan of a Judicial Council with advisory powers only. They report annually to the Legislature and suggest such changes as they think necessary in the procedure of the courts to make them function most efficiently and transact their business most expeditiously and economically consonant with justice in the trials of cases before them.

The Councils then hope to bring about the necessary reforms in procedure by bringing pressure and influence to bear upon the Legislature, and thereby secure the passage of laws carrying into effect their suggestions. While much doubtless has already been accomplished by this plan, it is open to two criticisms: First, as a rule the Councils are usually composed of such a large number of members they are unwieldy; and second, their power being an advisory one, it will necessarily take a long time to accomplish any great or fundamental changes through the Legislatures. Experience has amply demonstrated that legislative bodies move slowly in bringing into existence reforms of this nature, and then only when unusual pressure is brought to bear.

A PLAN PROPOSED

From a careful survey and study of what has been accomplished in the way of procedural reform within recent years by eleven or twelve states, some of them attacking the problem through the medium of Judicial Councils composed of lawyers and judges, some through State Supreme Courts acting as a council, and still others through a Supreme Court possessed of the rule-making power, ample and plenary, given by the Legislature; also from a study of the workings of the Rule Committee in the English Judicial System it appears the most effective and comprehensive way to deal with the problem would be to have the Legislature set up a rule commission, composed of not more than eight or ten judges and lawyers, and bestow upon this commission full and complete powers to make all necessary rules of pleading, practice and procedure of every nature for all of the courts of the state. The rules made by this committee to have all the force and power of law, but not going to the extent of entering the field of substantive law, or running counter to the organic law of the land, or in any wise impairing the fair administration of justice in the courts. This is to contemplate a surrender on the part of the Legislature of its powers as to such matters. A grave departure of this nature from a course long pursued and adhered to in the history of the state might cause in the breasts of some fear that the plan might not work well. It has worked well, however, in the great English Judicial System and has eliminated evils with which our judicial system now labors under and that is bringing reproach from laymen and jurists alike. It is working well where adopted in sister states. If we stand gripped with fear and apprehension at the thought of breaking away from ancient custom and uses, when modern conditions demand a change, all progress will be stifled and, instead of forging ahead, we will stand still, while progressive states are casting off the weight under which their courts are laboring.

The commission above suggested would be presided over by the Chief Justice of the Supreme Court, who will be a member thereof. The other members to be suggested to the Chief Justice for appointment, by the State Bar Association, who will have the power to appoint them. These to consist of two circuit judges, two chancery judges, three distinguished lawyers, one from each supreme court

district, and one member of the faculty of the School of Law.

The plan proposed would insure a commission composed of able jurists who, through years of training and experience, are conversant with the law of procedure, pleading and practice in the state. Their learning and fidelity would insure the creation of rules of procedure that are necessary to the proper functioning of the courts with a minimum of delay and cost. The following reasons, by way of summary, might be suggested as to why this plan should appeal to every thoughtful citizen of the state: (a) It would be a determined move, not a gesture, towards simplifying the procedure of the courts which now causes vexatious and costly delays in the administration of justice; (b) it would provide a plan for continuous scientific study of the problems of court procedure; (c) it would locate the rule-making power of the courts in a small and flexible committee composed of men learned in the law and thoroughly competent to grapple with the problems confronting them; (d) it would substitute orderliness, system and efficiency in the place of haphazard methods which have resulted in giving to us a sort of patchwork scheme of procedural law; (e) it would substitute organized high-powered group work by men of expert and scientific thought and mental training in the place of the single jerky efforts from time to time by individuals working through the legislative body.

THE TWO DONEE STATUTE

By J. W. Dulaney

Our statute forbidding estates in fee tail and allowing an unlimited succession of living donees, or the "heir of its body," the present Two Donee Statute[1] has now been in our books more than one hundred years. In at least forty cases the Supreme Court of Mississippi has been called upon to construe or apply it, and the reported opinions and excerpts from briefs fill about six hundred pages of Mississippi Reports. Litigation involving the statute is decidedly on the increase. More than half of these decisions have been rendered within the past twelve years. Beginning with 111 Mississippi and running through Volume 117 (with a single exception), one or more such cases will be found in each volume. In 1856 one of our greatest lawyers said to the High Court of Errors and Appeals, "We feel the utmost confidence . . . that whatever other courts have done, this court will declare the law as it is, and relieve the questions now before it from all future cavil."[2] The court replied with a most scholarly opinion, notwithstanding which the "cavil" continues. Several good reasons exist.

It seems customary to lay these difficulties upon the wording of the statute. "The original draftsman of the Statute had no conception of his own meaning, or of the common law rules he was displacing," once said learned counsel, and the court conceded "the obscurity and confusion resulting from the ignorance of the draftsman" and added that the "incongruity of dealing, in the same section, with the subjects of fee tail and the rule against perpetuities, is obvious."[3] If the unnamed draftsman could now read the forty cases, briefs of counsel and this article, he would doubtless admit the justice of this criticism, but I imagine that he would add with some satisfaction that his was not the only ignorance that had contributed to the obscurity and confusion. Nor is this any great reflection upon bench or bar. The subject of estates and per-

1 Section 2424, Hemingway's Code of 1927; Section 2765, Mississippi Code of 1906.

2 Brief of Hon. William L. Sharkey in Jordan vs. Roach, 32 Miss., at page 544.

3 Middlesex Banking Co. vs. Field, 84 Miss., 646, 37 So. 139.

petuities is inherently difficult. "The study and practice of the Rule against Perpetuities is indeed a constant school of modesty," said the greatest authority on the rule.[4] Terminology, as usual, is tricky. Courts apply several names to the same estates, and the same name to different estates. Much of the trouble lies in the construction of wills. The sound and disposing mind of which testators boast, by their attorneys or perhaps by the justice of the peace, sometimes has as little conception of its own meaning as our much-abused draftsman of the statute. Sometimes it forgets that words and phrases can have several meanings. Sometimes, in the most ingenious effort to supervise from the grave the affairs of the living, it is not sufficiently prophetic with respect to future births and deaths.

Within the space allotted to this article we can do no more than consider broadly a few phases of this statute and such practical questions as, What is forbidden and what is the result when the law is violated? Analyzing, we find first a clear prohibition, then a statement of the kind of estate which the law substitutes for an intended fee tail, followed by authority to make a conveyance of a kind which had always been permitted.

"Estates in fee tail are prohibited; and every estate which, but for this statute, would be an estate in fee tail, shall be an estate in fee-simple; but any person may make conveyance or a devise of lands to a succession of donees then living, not exceeding two, and to the heirs of the body of the remainderman, and, in default thereof, to the right heirs of the donor, in fee simple."

"Estates in fee tail are prohibited." This is clear, concise language, without qualification. It appears that all estates in fee tail are prohibited. When estates tail are understood and recognized there should be no difficulty in applying this portion of the statute, but this is not always an easy matter. An estate tail is one which may pass from generation to generation through the heirs of the body indefinitely unless and until there be failure of issue. It may be a fee tail male or fee tail female, limited to descendants of one sex, or special and limited to the heirs of the body of a named wife or by a named husband begotten, which is merely a limitation to the joint heirs of the bodies of two persons.[5] In any event, it is an estate which may be ended only when issue generally or of a certain kind becomes extinct. This gives the impression of long duration of time, but in fact time is no

4 Gray, Rule Against Perpetuities, Preface.
5 Chitty's Blackstone, Book II, page 90.

part of the definition of the estate, because a fee tail may be terminated within thirty minutes after it is created, or it may last forever.

Confusion may arise because the characteristics of various estates are such that they permit combinations almost without number, and some possess similar characteristics. Extinction of issue being always a possibility, the fee tail and determinable fee have in common the characteristic of possible termination. It is also conceivable that a determinable fee might have in common with the fee tail the further characteristic of being determinable upon failure of issue. To illustrate, with a devise to A and the heirs of his body, and a limitation over to B upon failure of A's issue, the issue might enjoy the estate in succession until it was terminated and no holder could convey so as to deprive his issue of enjoyment. However, if the devise be to A, and if A's issue fail at any time in the future[6] then to B, we have a fee in A which he can convey to strangers to the blood, but which would be defeated whenever the issue of A failed. The duration of the estate would be the same as that of a fee tail, but it would be neither a fee tail nor a devise to a succession of more than two living donees. The court would doubtless strike down such a limitation either by applying the common law rule against perpetuities or by holding that any devise to one for the duration of the possible succession of more than two donees violated the statute. A similar case would exist if there were a devise to one for the life of others in succession. The Honorable Wiley P. Harris once called attention to the fact that there may be estates tail upon condition subsequent, or estates tail determinable and estates tail qualified, saying:[7]

"These remarks are made to qualify the assertion often repeated, that it is of the essence of an estate tail, that there should appear to be an intention to continue it to the lineal descendants to the remotest generation—an assertion which seems to imply that when there is a provision for its possible termination short of a general failure of issue, it is not an estate tail."

A case is now pending in the Supreme Court of Mississippi in which may be decided the effect of the statute on a combination of fee tail with a definite limitation of time, as, for example, a conveyance for a definite term of years to one and the heirs of his body.[8]

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6 See Section 2437, Hemingway's Code of 1927; Section 2778, Mississippi Code of 1906.

7 32 Miss., 487.

8 Shannon vs. Norfleet.

The second division of the statute reads: "and every estate which, but for this statute, would be an estate in fee tail, shall be an estate in fee simple." This language is clear enough, but we may note in passing that since prior to the passage of the act, fee tails were not recognized in Mississippi;[9] under a literal construction there were no estates to be converted by the act.

The third division of the statute is as follows:

"But any person may make a conveyance or a devise of lands to a succession of donees then living, not exceeding two, and to the heirs of the body of the remainderman, and, in default thereof, to the right heirs of the donor, in fee-simple."

This gives authority to place limitations upon a conveyance or devise within certain bounds and, since the thing authorized was already permitted, it by inference forbids going beyond those bounds and has been so construed by the court. Attention was early called by Judge Sharkey to the difference between the course of judicial decisions and legislation in England and America.

"In England the policy of the common law was shaped and sustained by the courts and perpetuities discountenanced. So far was this doctrine carried, that estates tail or conditional fees, although fettered and bound through all time to a particular course of descent by the terms of the gift, were declared by a forced construction, to be alienable after the birth of issue. And other contingent limitations were not more favored. But this policy of the common law did not suit the aristocracy of the country, who desired to perpetuate property in their own families; hence parliament was importuned to break it down, so as to enable the large landholders to make family settlements of their property; and as the wealth of the country had its influence, the statute de donis was passed, which restored entails and perpetuated them according to their original purpose. This, too, as it could not be repealed, was evaded by the judges. The judiciary was on one side—on the side of liberal public policy, and the best interests of society, in lending its aid to unrestrained alienation of property. The parliament and the nobility were on the other side, favoring the restraints on alienation, and the establishment of perpetuities in the families of the landholders. In this country the state of things is reversed; the legislative policy is to break down these perpetuities in every form, and to favor the free and unrestrained alienation of property. The judicial policy is to sustain and protect them, by evading the legislative enactments through the aid of construction and subterfuge. There, in a monarchy, we behold a free and liberal policy sustained by the courts, and opposed by the parliament. Here, in a free government, we behold a free and liberal policy promulgated and sustained by the legislative authority, and opposed by the judiciary—for the court will readily perceive, on examination of many of the American adjudications, that the power of the legislature has actually been evaded, and virtually set at naught, by the expansive power of the judiciary. So far has this been carried, that an eminent

9 Middlesex Banking Co. vs. Field, 84 Miss., 646, at page 664.

writer has declared that estates can be more readily locked up, and alienation is more effectually restrained, in Virginia than in England.''[10]

This criticism cannot perhaps be applied to the Supreme Court of Mississippi as justly as to some other courts. Although our court has in a few cases shown some tendency to extend by construction the limitations permitted, it has generally not hesitated to strike down those which went beyond the clear authority of the statute. In *Cannon vs. Barry*[11] the court held that a limitation over to one of the heirs of the body of the remainderman was good, and the court has also upheld a limitation over to one of the right heirs of the donors.[12] These cases were based upon the theory that the statute did not prescribe a formula of conveyancing, but did prescribe a limit of time, measured by lives rather than years, within which the donor could exercise unbounded discretion. While not consistent with a literal construction of the statute, these cases and later cases following them do not illustrate the tendency referred to by Judge Sharkey. On the contrary, under this construction, the donor is enabled to make a more definite limitation whereby title would be less involved than it would be if the limitation were to heirs of the body of the remainderman or heirs of the donor generally.

However, in the Redmond case[13] the court upheld a devise to the seven children of the testator during their lives. The codicil provided:

''And at the death of any one or more of my seven children, his or their part of the property, real and personal, shall be equally divided between my surviving children, and after the death of my last child, whether he has children or not, the property must be equally divided among all my living grandchildren, and it is my desire that this codicil be annexed to and made a part of my last will and testament as aforesaid, to all intents and purposes.''

The court held that this was one life estate for the term of the life of the longest liver of the seven children. It is obvious, however, that whatever the codicil did in theory, it actually devised interests in land to successions of more than two living donees. Had the devise been that of a certain definite interest in the land to each of the seven children for the life of the longest liver, it would have been a clear estate to one for the life of another and sufficiently objectionable because its extent could not be

10 32 Miss., 543.
11 59 Miss., 289.
12 84 Miss., 646.
13 Redmond vs. Redmond, 104 Miss., 512, 61 So. 552.

ascertained until seven persons had died in succession. In that case R could have conveyed his life estate in an undivided one-seventh interest, and the purchaser could have enjoyed it until all seven children were dead. However, this was not the purpose of the testator. Upon R's death neither his heirs nor his grantees could enjoy his estate. With respect to the enjoyment of one of the seven shares, the will provided not a possible but a certain succession of seven living donees. As we will show below, if it had provided merely a possible and not a certain succession of more than two living donees, the court would have held the limitations bad. The only uncertainty in the Redmond case was as to which of the seven shares there would be a succession of seven donees, that depending upon which of the children first died. Of course, there would necessarily be another share as to which there would be a certain succession of six living donees, another with a certain succession of five, and so on. It is very easily seen that the value of property might be greatly depreciated by reason of having the title in this condition, and the holding in the Redmond case permits the skillful draftsman to bring about some of the evils to prevent which the statute was enacted. It may be said that if the decision in the Redmond case had been otherwise the effect would be to destroy all joint tenancies in which there were more than two joint tenants, but it may be answered that it was the purpose of the statute to destroy all limitations previously permitted in which there was a succession of more than two living donees, unless the third donee fell within one of the two classes permitted by the statute.

Although sometimes urged to do so, the court has refused to apply the holding of the Redmond case to anything except a case of joint tenancy. In the Muse case[14] the devise was to the widow and six children, with provision that upon the death of any of the children without issue, the share of the child so dying should go over to the survivors. The court construed the limitation to apply both to the original share of a child and to the share of such child as increased by the deaths of brothers and sisters without issue. The estate in the widow with reference to her original share was recognized as a fee simple. The estates in the six children with reference to their original shares were clearly fees determinable by death without issue. Here, as in the Redmond case, it was possible for

14 Smith vs. Muse, 134 Miss., 827, 98 So. 436.

any one of the shares to pass through a succession of six living donees, but, as was not true in the Redmond case, it was possible for each of the shares to ripen into a fee simple and never pass beyond the first donee, and it was further possible that if the estates passed beyond the first donee none would ever pass beyond the second donee. The court held these limitations void and in this, as in other cases, recognized the following principle:

"In determining whether or not the provisions of the will violate the rule as to perpetuities, the court does not consider whether the estate, or interest, may vest within such time as not to violate the rule; the point is whether by any possibility the estate or interest may not vest until after the period prescribed by the rule. If so, the rule has been violated. A future estate or interest in property is invalid unless it is so limited under all possible contingencies, it must of necessity take effect within the legal period." [15]

The Muse case is very similar to the case of *Davenport vs. Collins,*[16] *Scott vs. Turner,*[17] and the recent case of *Norfleet vs. Norfleet,*[18] and the construction of the instruments involved in the four cases referred to is not easily reconciled with the construction of the will in the Bullard case.[19]

The result in a case such as those mentioned may turn upon the attitude with which the court construes the instrument. If it were true that an instrument is to be construed, if possible, so as to avoid a violation of the statute, the Muse, Scott, Norfleet and other cases might have been decided differently; because the court, to avoid a violation of the statute, could have said that the testator intended that the shares go over only one and upon the death of the first donee it was the intention that the others should take his share in fee simple. This was the construction placed upon the will in the Bullard case and the court did indicate such a rule, saying:

"If, however, the language of the will is reasonably susceptible of two different constructions, one of which will defeat and the other sustain the provisions, that construction should be adopted which will sustain and uphold the will in all its parts, if it can be done consistently with the established rules of law."

This might have been a wise course to have adopted originally, although then it would have been opposed to the great weight of authority elsewhere. What the court probably had in mind was the general rule that an am-

15 Alexander on Wills, Vol. 2, Sec. 1163.
16 95 Miss., 358, 48 So. 733.
17 137 Miss., 636, 102 So. 467.
18 119 So. 306.
19 Bullard vs. Bullard, 132 Miss., 544, 97 So. 1, Compare Armstrong vs. Thomas, 112 Miss., 272, 72 So. 1006.

biguous will is to be construed if possible so as to give effect to all of its parts, a rule which is properly applied to determine the intention of a testator, but has no bearing whatever upon the question as to whether that intention was in conflict with the statute. This statement appears in the Bullard case without reference to the rule as stated by Mr. Gray, which had previously been adopted in Mississippi[20] and has since been repeatedly quoted with approval.

"The two donee statute, like the rule against perpetuities, is not a rule of construction or a test by which to determine intention, 'its object is to defeat intention. Therefore every provision in a will or settlement is to be construed as if' the statute did not exist (Gray, Rule Against Perpetuities (2d Ed.) paragraph 629)." [21]

In only two other cases, so far as I have noticed, has the court shown any indication that this rule would not be followed. In the syllabus prepared by the court for the case of *Thompson vs. Green*[22] appears the statement that "in order to avoid perpetuities in construing testamentary provisions, it is the duty of court to hold that word 'heirs' means children, where it is manifest that such is intent of testator." This syllabus means little because, when the testator's intent is manifest, there is no need to resort to rules of construction either to avoid perpetuities or for any other purpose. A similar syllabus appears in connection with another recent opinion,[23] in which, however, the general rule as laid down by Mr. Gray is quoted with approval, so that no one should be misled.

The court has twice said that the statute has no effect upon executory devises.[24] As has been pointed out by Chief Justice Smith,[25] this was in conflict with several prior decisions, the question was not involved in the cases in which the statements were made and is not true of the statute.

In conclusion, let us consider the results which follow when the statute is violated. In regard to a fee tail, as we have noted, there can be no question. The statute con-

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20 Henry vs. Henderson, 103 Miss., 48, 60 So. 33.

21 Scott vs. Turner, supra, Lazard vs. Hiller, 110 So. 855, Bratton vs. Graham, 146 Miss., 246, 111 So. 353.

22 Thompson vs. Green, 110 So. 788.

23 Bratton vs. Graham, supra.

24 Middlesex Banking Co. vs. Field, 84 Miss., 667, Thomas vs. Thomas, 97 Miss., 714.

25 Bibby vs. Broome, 116 Miss., 70, 76 So. 835.

verts it at once into a fee simple.[26] The statute does not, however, definitely set forth the result of a violation of the two donee clause. Originally the court might have held that the estate of the first taker would not be enlarged because of void limitations, with the result that as to any remaining estate there would be intestacy or, in case of a deed, title would not pass out of the grantor. This policy cannot now be adopted, as the court has construed the statute as intending the same result for a violation of the latter part as in the case of a fee tail, and accordingly has held that after striking down void limitations the estate of a donee within the limit permitted, whether a life estate[27] or a fee determinable,[28] is enlarged by operation of law into a fee simple. Our court has quoted with approval from the leading case of *Brattle Square vs. Grant* as follows:

"Upon this point we understand the rule to be, that if a limitation over is void by reason of its remoteness, it places all prior gifts in the same situation as if the devise over had been wholly omitted." [29]

This statement scarcely goes far enough, because the rule has been applied as placing all prior gifts in the same situation as if the *restrictions upon them* as well as the devise over had been wholly omitted.[30]

Several years ago the history of this statute and several phases of it were discussed by the Honorable Blewett Lee, in an excellent article which appeared in the Virginia Law Review.[31] Mr. Lee is of the opinion that there is a distinction between the application of the statute to a will and its application to a deed. Citing *Gully vs. Neville*[32] and *Reddoch vs. Williams*[33] he says:

"The distinction is recognized in Mississippi that where a limitation is in violation of the rule in case of a will, if the effect of holding the limitation bad would be to destroy the general scheme of the testator's will so that the

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26 Bolton vs. Barnett, 131 Miss., 802, 95 So. 721; Wallace vs. Wallace, 114 Miss., 591, 75 So. 449; Liberty Bank vs. Wilson, 116 Miss., 377, 77 So. 145.

27 Davenport vs. Collins, 95 Miss., 358, 48 So. 733.

28 Smith vs. Muse, supra, Scott vs. Turner, supra.

29 3 Gray (Mass.) 142, 62 Am. Dec. 725.

30 Scott vs. Turner, supra.

31 May, 1924, Vol. 10, No. 7, page 533. Mr. Lee in this article states that a void limitation on a life estate will not increase it to a fee simple, citing the Reddoch case and Stigler vs. Shurlds, 131 Miss., 648. This appears to be correct when the life estate is in a definite share, (that is a share that cannot be expanded by the falling in of other estates) with alternate devises over one of which is not void; otherwise, however, as in Davenport vs. Collins, supra, when the only limitation after the life estate contains the possibility of being in part violative of the statute.

32 55 So. 289.

33 129 Miss., 706, 92 So. 831.

whole scheme of the will would fail, the effect will be that the entire will will be held bad . . . . . In case, however, of a deed, the court has not before it a choice of whether or not the whole transaction shall be set aside, for the validity of the deed does not depend upon any act of the court. It is effective of its own power so far as it is effective at all, not like a will which is not effective in any part, if it is denied probate."

I do not find such a distinction expressed or implied in the opinions cited by Mr. Lee, nor does the reason mentioned by him appear to be valid. The fact that a will must be admitted to probate should have no connection with the rule against perpetuities. The law permits alienation by will or deed and demands compliance with certain formalities for either to be valid. If the grant or devise to the first donee is sufficiently definite it should be given effect in either case, while if it is not sufficiently definite, neither could be valid.

We find the following statement by Chief Justice Whitfield in *Gully vs. Neville:*

"Another most ingenious effort to save the will is made by reference to the well-settled principle that, if the ulterior limitation is void, nevertheless the will may be saved by dropping that ulterior limitation and leaving the rest of the will to stand. But this doctrine, a thoroughly well-settled one, is subject to the necessary qualification that the principle cannot be applied where you cannot separate the ulterior limitation without interfering with the manifest purpose of the testator, as shown by the whole body of the will."

In another case the court said:

"Where the various provisions of a will are in fact independent, and not for the carrying out of a common or general purpose, those which are contrary to the rule may be rejected, and the valid provision upheld. The test is whether the rejected parts may be expunged without essentially changing the general testamentary scheme."[34]

The court has once held an instrument to be wholly void because of violation of the statute.[35] It has often for the same reason struck down limitations and left a fee simple in the first donee, and it has several times struck down limitations and left a fee simple in the second donee. In all three classes of cases it is certain that the court applied the statute so as to interfere with the manifest purpose of the testator as shown by the whole body of the will, and there should be laid down some rule whereby might be definitely known at what point a grant or devise should be cut off by the statute.

In the light of the latter cases, the holding that the instrument was wholly void in *Gully vs. Neville* does not appear to have been correct, especially in view of the fact

34 Reddoch vs. Williams, supra.
35 Gully vs. Neville, supra.

that the court said that the first disposition of the property by itself would have been perfectly valid. However, there is no inconsistency between the cases of the second and third classes.

Upon examination of the Muse case (or any one of the similar cases) the question at once arises as to why the limitations were cut off after the taking by the first donees rather than after a taking by the second donees. Six shares went to six children. It would seem that upon the death of A without issue the other children would be allowed to take the determinable fees in the share of A, which would then be converted from fees determinable into estates in fee simple. On first impression, this would do no violence to the statute. We cannot know, however, what A's share will be at the time it goes over by reason of his death without issue, because he may be the first, second, third, etc., to die, and since all of his share goes over, which is his original share as enlarged by deaths of brothers and sisters, there is the possibility that when it goes over it will be tainted in part by a violation of the statute. The same possibility exists with reference to each of the six shares, and since the court acts upon the possibility that the statute may be violated rather than any certainty, as we have seen above, all limitations upon the estates of the first donees are cut off. This is but another way of expressing what Judge Anderson referred to as possible different definite states of title. The cases in which the right of the second donee to take has been denied are all cases in which he could not have taken without the taking being tainted in part by a possible violation of the statute;[36] whereas the cases in which the second donee was permitted to take have been those in which he could do so without the possibility of such a taint.[37] To illustrate, assuming none of the donees to be heirs of the body of the remainderman or right heirs of the donor, with a devise to A for life and upon his death to B and upon his death to C, the limitation to C would be struck down, but B would take in fee simple upon the death of A, there being no possibility of the violation of the statute in the limitation from A to B. The same would be true if it read to A and if he die without issue to B and upon the death

36 Smith vs. Muse; Scott vs. Turner; Norfleet vs. Norfleet, supra; Hudson vs. Gray, 58 Miss., 882; Nicholson vs. Field, 111 Miss., 638.

37 Henry vs. Henderson, 103 Miss., 48, 60 So. 33; Bibby vs. Broome, 116 Miss., 70, 76 So. 835; Stigler vs. Shurlds, 131 Miss., 648; Reddoch vs. Williams, supra.

of B without issue to C, in which case upon the death of A without issue, B would take in fee simple. And with a grant or devise to A, B, C and D, or for that matter to forty persons, share and share alike, with remainder upon the death of any of them to the survivors, the entire purpose of the instrument would be upheld on the theory that the statute did not apply to joint tenancies. But in case of a grant or devise to A, B, C and D, share and share alike and upon the death of any of them without issue, his share to go to the survivors, each of the first donees takes in fee simple, because there is no certainty that any one share would go over without having previously been enlarged by reason of a second taking. I think the same result would follow if in the case last assumed there were the added provision that upon the death of A, B, C or D leaving children, such children should take the share of the parent, unless the instrument contains something which shows that only the original share is referred to.[38] The recent case of *Lazard vs. Hiller*[39] may appear to conflict with what has been said, but an examination of the entire will involved in that case shows clearly that it does not, as the testatrix did not make a devise of shares to her children with cross limitations, but instead made a distinct devise to each child and then places distinct limitations upon each devise. This was a method of minimizing the effects of the statute suggested by Mr. Lee some years before, in the article above mentioned.

38 See note 31.
39 110 So. 855.

THE STATUTE—
Purpose of.
Privilege Conferred Thereby.
A Rule of Evidence.
To What Actions Same Applies.

THE AFFIDAVIT—
Sufficiency of.
Who May Make.
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THE ACCOUNT—
Exactness Required.

THE COUNTER-AFFIDAVIT—
When Necessary.
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When Same May Be Filed,
On Appeal From J. P. Courts.
Effect of Filing Same.
Effect of Failure to File Same.
Defenses That May Be Interposed Without the Filing of Same.

ACTIONS—
Absence of Counter-Affidavit.
Forfeiture of Rights Under the Statute.
Failure of Plaintiff to Demand Judgment at Proper Time.
Pleading and Practice.
Proof.

HEMINGWAY'S ANNOTATED MISSISSIPPI CODE, 1927, SEC. 1710.

By F. Y. Dabney

AFFIDAVIT TO ACCOUNT ENTITLES TO JUDGMENT.—A person desiring to institute suit upon an open account in his favor, may make affidavit to the correctness of such account, and that it is due from the party against whom it is charged; and in any suit thereon such affidavit attached to the account shall entitle the plaintiff to judgment at the trial term of the suit, unless the defendant make affidavit and file with his plea that the account

is not correct, particularizing wherein it is not correct, in which event the affidavit to the account shall entitle the plaintiff to judgment only for such part of the account as the defendant by his affidavit shall not deny to be due; but this shall not apply to accounts against decedents and suits against executors or administrators. A defendant desiring to use an open account as a set-off shall be entitled to the benefit of this section.

THE STATUTE—Purpose of.

The purpose of the statute in this special cause of action is to allow the *ex parte* affidavit of the plaintiff to be proof of the account and to dispense with his oral testimony on the trial, or his deposition, and to relieve him of the trouble and expense of proving each item of the account sued on, where he makes affidavit to it as provided by the statute, and where the defendant by counter affidavit has failed to deny the correctness of the account as provided by the statute.[1]

THE STATUTE—Privilege Conferred Thereby.

The privilege conferred by the statute gives effect to the affidavits of the respective parties on the trial, but does not alter the law of pleading.[2]

THE STATUTE—A Rule of Evidence.

The statute is a rule of evidence, and not one of pleading or practice.[3]

THE STATUTE—To What Actions Same Applies.

The statute applies alone to suits on open account,[4] and is not applicable except in cases where the cause of action arose *ex contractu,*[5] and it has been held that the provisions of the statute would not entitle a plaintiff, suing in tort, to a judgment in his favor without proof,[6] the court in that case saying that "while technical forms of pleading are no longer regarded by our courts, the essential difference between actions *ex contractu* and actions *ex delicto* cannot be disregarded.[7] Nor does the statute apply to suits on bonds.[8]

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1 Gulf & Ship Island Railroad Co. vs. Kelly, 131 Miss., 133, 95 So. 131; Reinhardt vs. Carter, 49 Miss., 315.

2 Reinhardt vs. Carter, 49 Miss., 315.

3 Aaron vs. Podesta, 60 Miss., page 82.

4 G. & S. I. Railroad Co. vs. Kelly, 131 Miss., 133, 95 So. 131.

5 Illinois, etc. Railroad Co. vs. Andrews, 61 Miss., 474.

6 G. & S. I. Railroad Co. vs. Wells Lbr. Co., 111 Miss., 768, 72 So. 194.

7 G. & S. I. R. R. Co. vs. Wells Lbr. Co., 111 Miss., 768, 72 So. 194.

8 Adams vs. Insurance Co., 94 Miss., 433; American Surety Co. vs. U. S., 76 Miss., 289, 24 So. 388.

The statute itself specifically states that it does not apply to accounts against decedents and suits against executors or administrators. Nor was the statute intended to enable a person incompetent to testify to accomplish the same result by swearing to an open account itemized *ex parte*.[9]

THE AFFIDAVIT—Sufficiency of.

The affidavit required under this statute to entitle a party to judgment must be positive and made upon the knowledge of the affiant. The statute does not contemplate an affidavit made upon information and belief, and such affidavit amounts to nothing.[10] And it has been held that a statutory affidavit for an attachment on an open account, merely affirming, so far as relates to the indebtedness, that the defendant was justly indebted to plaintiff in a designated sum as shown by an account attached thereto, cannot be made to serve as an affidavit to the account under this section.[11]

THE AFFIDAVIT—Who May Make.

The statute says any person desiring to institute suit upon an open account may make the affidavit. And it has been held that a Treasurer of a corporation is such a person under the statute to make this affidavit.[12] And it appears that an attorney cannot make an affidavit for his client upon this section.[13]

THE AFFIDAVIT—When Same May Be Filed.

It would seem that the statute contemplates that the affidavit be made at the time of the filing of the suit, as it says that "a person desiring to institute suit on an open account in his favor, may make affidavit to the correctness of the account," etc. Also, it has been held that an affidavit to an account made and filed after the pleadings were made up, had no efficacy in putting the defendant to a denial of the several items under the oath, because it was not intended that either party by an affidavit subsequently filed as a part of the evidence could get the benefit of it.[14]

THE ACCOUNT—Exactness Required.

The accounts contemplated by the statute are itemized

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9 Greene vs. Greene, 145 Miss., 87, 110 So. 218.
10 Dicus vs. Republic Paint & Varnish Works, 127 Miss., 717, 90 So. 729.
11 Romoneda vs. Jackson, 93 Miss., 92, 46 So. 258.
12 Finck vs. Brewer, 133 Miss., 9, 96 So. 402.
13 Dicus vs. Republic Paint & Varnish Works, 127 Miss., 717, 90 So. 729.
14 Greene vs. Greene, 145 Miss., 87, 110 So. 218.

accounts.[15] The account must show dates of purchase, the kind of goods, the quantity and the price.[16] And it has been held that an account omitting character of goods purchased is insufficient.[17]

COUNTER-AFFIDAVIT—When Necessary.

The statute does not require an affidavit with the plea except where the original correctness of the account or of some of its items is attacked. Such pleas only as are intended to put in issue the original correctness of the account sued on are required to be verified by affidavit,[18] and the defendant is not precluded from interposing affirmative matters in confession and avoidance,[19] or payment,[20] as a defense to the suit without the filing of the counter-affidavit.

COUNTER-AFFIDAVIT—What to Contain.

The counter-affidavit must contain a denial of the correctness of the account, either generally, or specify the particular item or items to be contested. If there is no specification of particular items of the account as incorrect, the defendant will not be permitted to controvert the particular items of the account, but only the fact that he is properly chargeable as a debtor on the account, and if he be shown to be debtor for any part of the account, he shall not be permitted under his general affidavit to question any of the items of the account.[21]

COUNTER-AFFIDAVIT—Sufficiency of.

The affidavit must specify wherein the account is not correct.[22] A counter-affidavit denying the correctness of the account generally, without particularizing wherein it was incorrect, was held insufficient to put the plaintiff to the proof of the items thereof,[23] nor will the defendant be permitted to controvert the particular items of the account, but only the fact that he is properly chargeable as a debtor on the account.[24] A bare affidavit filed by defendant "that he (defendant) does not owe the above

15 Finck vs. Brewer, 133 Miss., 9, 96 So. 402.

16 Finck vs. Brewer, 133 Miss., 9, 96 So. 402, citing Pipes vs. Norton, 47 Miss., 61.

17 Finck vs. Brewer, 133 Miss., 9, 96 So. 402.

18 Bower vs. Henshaw, 53 Miss., 345.

19 Aaron vs. Podesta, 60 Miss., 82.

20 Bower vs. Henshaw, 53 Miss., 345.

21 Tichenor vs. Woodburn Wheel Co., 54 Miss., 589; Greene vs. Greene, 145 Miss., 87, 110 So. 218.

22 Tichenor vs. Woodburn Wheel Co., 54 Miss., 589.

23 Richter Mfg. Co. vs. Vicksburg Candy Co., 127 Miss., 717, 90 So. 445.

24 Tichenor vs. Woodburn Wheel Co., 54 Miss., 589.

account or any part thereof, but that the same has been fully paid,'' was held not to be a counter-affidavit within the statute.[25]

COUNTER-AFFIDAVIT—Defenses That May Be Interposed Without the Filing of Same.

Such pleas only as are intended to put in issue the original correctness of the account sued on are required to be verified by affidavit,[26] and the defendant is not precluded from interposing affirmative matters in confession and avoidance as a defense to the suit;[27] nor is he cut off from showing that none of the items of the account is due by him because he never made the contract out of which they grew,[28] and it has been held that ''payment'' is a good plea without an affidavit.[29]

COUNTER-AFFIDAVIT—When Same May Be Filed.

The statute provides that the counter-affidavit shall be filed by the defendant ''with his plea.'' However, the court has not put a strict construction on this part of the statute, but has been very liberal in permitting the defendant to file his counter-affidavit any time before trial of the cause,[30] and it has been held on appeal from a Justice of the Peace Court that a counter-affidavit may be filed for the first time in the Circuit Court. In this case the court said: ''If the defendant had in the Circuit Court asked leave in time to put in an affidavit denying the correctness of the account sued on, it would have been proper to have allowed it, though none had been filed in the Justices' Court. But no such leave was asked until after the parties had gone to the jury, and the plaintiff, having read his account and the affidavit of its correctness, closed his case. There was no error in the refusal of the court to then allow the defendant to put in a counter-affidavit. The plaintiff had already entitled himself to a verdict.''[31]

COUNTER-AFFIDAVIT—On Appeal From Justice of the Peace Courts.

On appeal from Justice of the Peace Courts, counter-affidavits may be filed for the first time in the Circuit Court, but the court has held that it was too late ''after

25 Greenburg vs. Saul, 91 Miss., 410, 45 So. 569.
26 Bower vs. Henshaw, 53 Miss., 345.
27 Tichenor vs. Woodburn Wheel Co., 54 Miss., 589.
28 G. & S. I. R. R. Co. vs. Kelly, 131 Miss., 133, 95 So. 131.
29 Bower vs. Henshaw, 53 Miss., 345.
30 Richter Mfg. Co. vs. Vicksburg Candy Co., 127 Miss., 717, 90 So. 445.
31 Rose vs. Watson, 54 Miss., 673.

the parties had gone to the jury, and the plaintiff, having read his account and the affidavit of its correctness, closed his case."[32] In the case of *Aaron vs. Podesta,*[33] originating in a Justice of the Peace Court, in which case no counter-affidavit was filed, on the trial in the Circuit Court the defendant demanded that the case be submitted to the jury, and the court held that in cases commenced in a Justice of the Peace Court, neither before the Justice of the Peace nor on appeal in the Circuit Court is the defendant required to plead in writing, and the case should have been submitted to the jury for trial, as it must be presumed that the request for a jury was for the purpose of making some permissible defense, since it is a question of fact which is to be decided, and questions of fact are to be determined by the jury, and not by the court, however strong may be the evidence by which the issue on the part of one or the other of the litigants is supported.

COUNTER-AFFIDAVIT—Effect of Filing Same.

If the defendant makes the affidavit, then the *prima facie* correctness imparted by the plaintiff's affidavit is done away with, and the plaintiff must sustain his account by other evidence; in other words, the affidavit affects the question of the value of the account as evidence.[34] An affidavit that a particular item of a sworn account, filed with the plaintiff's declaration, is incorrect and that defendant does not owe said sum, or any part thereof, is a sufficient compliance with the provisions of the statute to place upon plaintiff the burden of proving the correctness of the disputed item.[35]

COUNTER-AFFIDAVIT—Effect of Failure to File.

If a defendant sued upon an open account duly sworn to under the statute does not file a counter-affidavit he cannot question the correctness of the account.[36]

ACTIONS—Absence of Counter-Affidavit.

Where the plaintiffs have made affidavit to the account as provided by the statute, on producing the account and affidavit in evidence to the jury, they are entitled to verdict in the absence of a counter-affidavit.[37] Plaintiff should introduce his account in evidence, rest his case

32 Rose vs. Watson, 54 Miss., 673.
33 60 Miss., 82.
34 Reinhardt vs. Carter, 49 Miss., 315.
35 Goshen Mfg. Co. vs. Tonkel, 123 Miss., 659, 86 So. 453.
36 Bonner vs. White, 78 Miss., 653, 29 So. 402.
37 Rose vs. Watson, 54 Miss., 673; Ware vs. McQuillan, 54 Miss., 703.

and demand judgment and object to all testimony introduced by defendant and move to exclude same.[38]

ACTIONS—Failure of Plaintiff to Demand Judgment at Proper Time. Forfeiture of Rights Under the Statute.

In an action on a sworn account and in absence of counter-affidavit, where the parties go to trial on the pleadings without objection, and without any motion for a judgment under the statute, it is too late, after having examined witnesses at length upon the merits without objection, and with no motion to exclude the testimony, to seek the advantage of the statute by an instruction to the jury,[39] and the plaintiff, by omitting to ask for a judgment or to object to the introduction of the evidence, waives his rights under the statute and consents to a trial by jury.[40]

ACTIONS—Pleading and Practice.

The privilege conferred by the statute does not alter the law of pleading, but gives effect to the affidavits of the respective parties, on the trial.[41] In the case of *Reinhardt vs. Carter* it has held that a plea of *non assumpsit* without affidavit postpones the case, from the appearance, to the next succeeding term; for the plaintiff cannot have judgment until the "trial term." The court said, "The law requires issues of law, and upon dilatory pleas to be settled at the appearance term."[42]

It has been held that where the plaintiff has made affidavit to his account, under the statute, and the defendant has filed no counter-affidavit, on producing the account and affidavit in evidence to the jury the plaintiff is entitled to verdict; and if the defendant demurs to the evidence, and the Circuit Court gives judgment for him, the Supreme Court, on error, will reverse the judgment, and render one for the plaintiff.[43]

A plea of payment has been held to be a good plea without a counter-affidavit,[44] and it has been held that any plea in confession and avoidance is sufficient without

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38 Bloom vs. McGrath & Compton, 49 Miss., 315; Covel vs. Smith, 68 Miss., 296, 8 So. 850.

39 Bloom vs. McGrath & Compton, 49 Miss., 315; Covel vs. Smith, 68 Miss., 296, 8 So. 850.

40 Bloom vs. McGrath & Compton, 49 Miss., 315.

41 Reinhardt vs. Carter, 49 Miss., 315.

42 Reinhardt vs. Carter, 49 Miss., 315.

43 Ware vs. McQuillan, 54 Miss., 703.

44 Bower vs. Henshaw, 53 Miss., 345.

the counter-affidavit[45] or a plea denying that there was ever any contract between the parties.[46]

A plea of general issue, together with counter-affidavit denying the correctness of the account generally, without particularizing wherein it is incorrect, brings the defendant's liability on the account in issue, and this issue should be submitted to a jury if there is a conflict of evidence thereon.[47]

ACTIONS—Proof.

Plaintiff, met by sworn denial, has burden of proving correctness of items of account, and evidence to show that defendant has listed the plaintiff as a creditor in a schedule in bankruptcy is insufficient proof.[48]

LIST OF CASES CITED

Aaron vs. Podesta, 60 Miss., 83.
Adams vs. Insurance Co., 94 Miss., 433; 49 So. 119.
American Surety Co. vs. U. S., 76 Miss., 289; 24 So. 388.
Bloom vs. McGrath & Compton, 53 Miss., 249.
Bonner vs. White, 78 Miss., 653; 29 So. 402.
Bower vs. Henshaw, 53 Miss., 345.
Covel vs. Smith, 68 Miss., 296; 8 So. 850.
Dicus vs. Republic Paint, etc. Works, 128 Miss., 189; 90 So. 729.
Finck vs. Brewer, 133 Miss., 9; 96 So. 402.
Greenburg vs. Saul, 91 Miss., 410; 45 So. 569.
Greene vs. Greene, 145 Miss., 87; 110 So. 218.
Goshen Mfg. Co. vs. Tonkel, 123 Miss., 659; 86 So. 453.
G. & S. I. R. R. vs. Kelly, 131 Miss., 133; 95 So. 131.
G. & S. I. R. R. vs. Wells Lbr. Co., 72 So. 194.
Illinois Central R. R. vs. Andrews, 61 Miss., 474.
Reinhardt vs. Carter, 49 Miss., 315.
Richter Mfg. Co. vs. Vicksburg Candy Co., 127 Miss., 717; 90 So. 445.
Romomeda vs. Jackson, 93 Miss., 92; 46 So. 258.
Rose vs. Watson, 54 Miss., 673.
Rossie vs. Julius Levy & Sons Co., 145 Miss., 426; 110 So. 864.
Tichenor vs. Woodburn Wheel Co., 54 Miss., 589.
Ware vs. McQuillan, 54 Miss., 703.

45 Aaron vs. Podesta, 60 Miss., 83.
46 Gulf & S. I. R. R. Co. vs. Kelly, 131 Miss., 133, 95 So. 131.
47 Richter Mfg. Co. vs. Vicksburg Candy Co., 127 Miss., 717, 90 So. 445.
48 Rossie vs. Julius Levy & Sons Co., 145 Miss., 426, 110 So. 864.

LEGISLATION AND THE WAY-FARING MAN

By Robert J. Farley

The development of any legal system has usually been the result of certain "agencies by which law is brought into harmony with society." "These instrumentalities," says Maine, "seem to be three in number, Legal Fictions, Equity, and Legislation. . . . Legislation, the enactments of a legislature, which whether it take the form of an autocratic prince or of a parliamentary assembly, is the assumed organ of the entire society, is the last of the ameliorating instrumentalities. It differs from legal fictions just as equity differs from them, and it is also distinguished from equity as deriving its authority from an external body. Its obligatory force is independent of its principles. . . . In the youth and infancy of a nation it is a rare thing for the legislature to be called into action for the general reform of private law. The cry of the people is *not* for *change in the laws,* which are usually valued above their real worth, but solely for their complete, pure and easy administration; and recourse to the legislative body is generally directed to the removal of some great abuse or the decision of some incurable quarrel between classes or dynasties. There seems in the minds of the Romans to have been some association between the enactment of a large body of statutes and the settlement of society after a great civil commotion. . . . It was very scanty during the republic." (Ancient Law, Pollock's Edition, 29, 33, 44, 45.)

One chief reason why the law today is less in harmony with society than formerly may be attributed to the adoption in toto by legislative bodies generally, either consciously or unconsciously, of the Blackstonian idea of law as being simply "a rule of civil conduct prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong," the fallacy of which has been long since recognized and proven. But as the spirit and beliefs of a time mold and shape its manner of thought and the very current of its life, so also are formed its statutes, and as a result of the influence of the school of Bentham, we are presently living in a kind of compromised age of codification, with its attendant curses. The

legislatures are but reflections of the beliefs of their constituencies. The average citizen believes that if he can get a legislative prescription or proscription in the form of a single statute, that the result will be law which will command what is right and prohibit what is wrong—a wonderful tribute of confidence in the supreme power of the state, and yet a havoc-making premise, thoroughly inconsistent with our well-defined theory of jurisprudence. Legislatures may have the authority and power to make adjective or administrative laws, which is their primary function; they have the authority to give expression to substantive law, they do not have the power to make or creat substantive law, and any written constitution which purports to confer such a power is to that extent mere meaningless writing. Savigny said that no law, however theoretically good, could be forced upon a people which had not by its past experience become prepared for it, which is another way of saying that laws are and of necessity must be ultimately grounded in custom, using the term in its broadest sense. Law is not the product or prescription of the supreme power of the state, but, rather, the supreme power is the product of law—its prescription for its own administration. Law existed before the state, it continues unscathed though desecrated through anarchy, and only after its recognition does it smile on the efforts of revolution, bloodless or otherwise.

Contrary to the ordinary layman's interpretation of effect and practice, a tremendous difference would be made in legislative effort and result if it should be assumed as a major premise by that body that statutes and government were designed primarily for the benefit of the law-abiding citizen, instead of the narrower view that their chief function is the inhibition, suppression and control of the law-breaking citizen. By way of example, take the matter of amendment or repeal. It is one of the fundamental maxims of the common law that ignorance of it exuses no man. Stated affirmatively, the law presumes every man to know the law. It is a presumption founded not only on expediency and policy but on admitted necessity. And yet this necessary presumption has been feared as a menace to human rights and liberties since time immemorial. It was this fear which caused the first demand that laws be reduced to writing. It is on account of this presumption primarily that we adhere to the doctrine of precedents. The common law countries of the world be-

lieve that certainty and stability are next to godliness, and sometimes superior, as legal virtues. Courts are loathe to overrule former decisions and extremely slow to modify them. The older the decision, the more guarded and cautious its disturbance. Why? Because a highway, good save for one uncharted pitfall, is more dangerous and to be feared than a roadbed less smooth but having every hazard so plainly marked and every hole so clearly defined that a way-faring man, though he be a fool, shall not err therein, but may steer clear. Men do not fear known dangers so long as they may be avoided, but that which terrorizes the heart and harrows the soul is the ominous presence of quicksand covered over by a layer of sod. Time veneers any custom, precedent or statute with an outward appearance of strength, which may eventually become actual by encystation with the tentacles of other customs, precedents and laws, the incautious removal or change of which will cause irremediable pitfalls and crevasses, uncharted and unknown, in the highway of social progress. For this reason the courts consider it immoral (which, after all, means against custom) to remove, cut off or add to any portion of the pavement of apparent law without insistent demand based on reason following human experience which vouchsafes consequent widespread publication, and such action then is taken only when the unity of the whole will not be too greatly impaired. Legislatures seldom have this same comprehension of the whole nor veneration of the effects of time when a change of one of its own enactments or of the common law is suggested.

It has been said in commendation of the dog that when troubled with fleas he does not draw up an indictment against the universe, but starts in to scratch. But when a flea bites a member of society, he rushes forthwith to the Legislature for a repeal, an amendment or an enactment, and only too often that body complies with something which neither retards the flea nor relieves with a good scratching, but has an effect entirely uncontemplated and unexpected, particularly as to the remainder of society, which did not suspect that it was being subjected to a new cure. Enactments, amendments and repeals as to administrative law should be approached cautiously, and as to substantive law, either directly or indirectly, should be passed only after great abuse or civil commotion with its attendant widespread publication, in order that the way-faring man may know, if for no other reason.

During two years our Supreme Court will hand down some eight hundred decisions. The probabilities are that not a single precedent will be overruled in such a period, no new precedent set and few modified, but each will be catalogued into its proper block to add to the strength of the present firm structure. Our Legislature meeting once during such a period will, in addition to new enactments, amend some seventy-five or one hundred former enactments and repeal from ten to one hundred. Of course, many of these will pertain to purely administrative matters, but those of a substantive nature will not be spared, and that without any widespread demand based on abuse or civil commotion. Take, for example, the fourth section of the Statute of Frauds, which, though it may be classified as adjective, yet in its nature is substantive. The Session Laws of 1926, Chapter 152, contain an amendment of a statute which has come down with little modification since 1678, with the consequent advantage of court interpretation on the dotting of each *i* and the crossing of each *t* almost; a statute which in substance is very widely known to the way-faring men of business. Was there any insistent demand generally for its amendment? Was there general hardship and abuse complained of its former expression? Is its modification known to other than a few lawyers in the state? It may be that the changes are immaterial. It may be that had it been so passed in the beginning that it would have been a distinct advantage, but these matters are beside the point. This particular illustration is used simply as being apt in present legislative theory.

The common law doctrine is inhibitive of change but not of development, productive of formalism and a guardian of conservatism, but worse charges might be made against a legal system. It is believed that despite any charges which might be made, it is these characteristics which have served as a bulwark to give stability to the great common law countries, England and America, during these days of restiveness in civil law countries. Legislatures might do well to study the attitude of our courts toward principles once announced.

THE BULK SALES LAW AS CONSTRUED IN MISSISSIPPI

By J. C. Satterfield, Student

For twenty-one years there has been upon our books a statute which is known as the Bulk Sales Law. For many years this statute was little availed of in the courts, if the records of the Supreme Court of the state can be taken as an indication. Indeed, during the first seventeen years that it lay upon our statute books, only five cases involving its construction have reached our highest court.

The decision in the case of *Walton vs. Walter Fisher Company,* handed down in September, 1926, and appearing in 146 Miss. 291, 111 So. 364, has brought forcibly to the attention of the lawyers of the state the fact that it is now practically impossible for anyone to buy a stock of merchandise under this statute with safety.

The practical effect of this decision, as a culmination of a line of authority beginning with the case of *William Moore Co. vs. Rowe,* 97 Miss. 775, 53 So. 626, broadened by the opinion of the court in the case of *The International Shoe Co. vs. Gunn,* 121 Miss. 679, 83 So. 742, is that although the purchaser of merchandise in bulk exercises the utmost good faith, and the highest degree of diligence in attempting to discover creditors of the seller, and although the purchase money is used in paying the creditors of the seller, yet if the seller omits the name of a creditor in the list required by the statute, and his debt remains unpaid, the purchaser of the goods will be held liable for the debt.

In recent years, probably largely because of the broad construction placed upon this statute by the court, this law has become much more popular as a resort of creditors seeking to recover their claims. During the last four years more than twice as many cases have been decided by our court of last resort involving this statute as were passed upon in the preceding seventeen years, for since 1925 twelve such decisions have been handed down.

It is interesting to note the adoption of the various bulk sales acts as indicative of its purely statutory character. Until the year 1901 practically none of the states in the Union had any statute of this nature, although under

a statute of Louisiana passed in 1896, sales not covered by this law were made a misdemeanor.

Soon after that time, especially during the period 1901-1910, there was a rapid spread of such statutes, until most of the states now have acts which correspond to our statute. Prior to the adoption of our statute in March, 1908, thirty states and the District of Columbia were operating under one form or another of the Bulk Sales Law.

During the early history of these statutes several states held them to be unconstitutional on the grounds of their violating the due process clause of the Constitution, the guarantee of equal protection of laws, or the right to acquire, possess and protect property. Among these states were Illinois, Indiana, New York, Ohio and Utah. All of these states except Utah subsequently passed statutes which were upheld, or their courts reversed themselves on this question.

The Mississippi statute, Sections 3335-3338 of Hemingway's Code of 1927, Sections 3129-3132 of Hemingway's Code of 1917, is a copy of the Tennessee law, which was passed in that state in April, 1901.

Our court early disposed of the contention of unconstitutionality with scant notice in the case of *Moore Dry Goods Co. vs. Rowe, supra,* only two and a half lines being devoted to this question. This case was decided in 1910 and was the first one decided involving a construction of this statute.

Section one of our statute reads as follows: "A sale of any portion of a stock of merchandise, otherwise than in the ordinary course of trade, or in the regular and usual prosecution of the seller's business, and a sale of an entire stock of merchandise in gross, shall be *presumed to be fraudulent and void* as against the creditors of the seller, unless, at least five (5) days before the sale:

a. The seller shall have made a full and detailed inventory, showing the quantity, and, so far as can be done by the exercise of reasonable diligence, the cost price to him of each article sold; and

b. The purchaser shall have in good faith made full and explicit demand of the seller for the name, place of residence and business and post-office address of each of his creditors, and the sum due each, and to which demand the seller shall have made full and truthful written answers; and

c. The purchaser shall have in good faith notified personally or by mail each of the seller's creditors, of whom he has knowledge, or *with the exercise of reasonable diligence could have acquired knowledge,* of the proposed sale and of the cost price of the merchandise proposed to be sold and of the price to be paid therefor by the proposed purchaser."

Section two makes provision for the protection of creditors in subjecting insurance policies to their claims in case of fire, and section three provides that the act shall not apply to official sales, neither of which is of interest here.

Section four provides: "That, except as especially provided in this act, nothing herein contained nor any act hereunder, shall change or affect the present rules of evidence or the present presumption of law."

There are two general classes of statutes, one class declaring that all sales not made in compliance with the requirements thereof shall be fraudulent and void, or conclusively presumed to be fraudulent and void as to creditors of the seller. The other class declares that such sale shall be presumed to be fraudulent and void as to such creditors.

Our statute as written belongs to the latter class, for it not only declares that such sales shall be *"presumed to be* fraudulent and void," and the fourth section of the act provides that "the rules of evidence or presumption of law shall not be changed *except as provided in this act."*

Many courts, seemingly a majority of them, in construing similar statutes, have held that they simply prescribe a rule of evidence, throwing the burden of showing good faith on the purchaser, which burden can be sustained by any competent evidence sufficient to show that the transaction was not fraudulent in fact. The Mississippi court seemed to recognize that it was holding in the minority when Judge Anderson prefaced his opinion in the *Moore Dry Goods Co. vs. Rowe* case, *supra,* by saying, "The decisions of the courts of other states on the question here involved are not controlling with this court, but merely persuasive. If unsound, they are not to be followed."

The holding of the Mississippi court in brief is that this statute enacts a rule of substantive law, fixing as fraudulent and void, so far as the rights of creditors are concerned, all sales made in violation of it, and evidence of good faith and payment of value will not be heard, nor

will diligence on the part of the purchaser in attempting to find the names of creditors avail him anything.

In construing this statute the courts have been influenced by two general rules, the first of which is that "the bulk sales law is in derogation of the common law, and must be strictly construed." *Whittington vs. Yazoo Mtg. Co.,* 148 Miss. 870, 114 So. 752. The second is that "in construing a statute, the evil sought to be remedied must be kept in view; and, if not violative of its plain provisions it must be made to accomplish the purpose intended," *Moore vs. Rowe, supra.*

It seems, however, that the first of these principles has been lost sight of with reference to the compliance with the provisions of this law. Chief Justice Sydney Smith, in a dissenting opinion to the Moore case, contended through authorities cited that under the strict construction of this statute, the first line of authorities mentioned above were correct. Had this opinion been adhered to as authority in Mississippi, the purchaser of merchandise in bulk would not be faced by the impasse which is before him today.

In the Walton case, *supra,* the Mississippi rule is laid down: "The sale and purchase of a stock of merchandise without compliance with the requirements of the statute is void, notwithstanding such sale and purchase was made in good faith and for value. The purchaser takes the goods at the peril of the statute not having been complied with. He must see that it is complied with. The purpose of the statute to make the sale of stocks of merchandise in bulk *prima facie* fraudulent to creditors of the seller. Such *prima facie* case can only be met by the purchaser by showing that the statute was complied with. He must show that the required inventory was made, and notice to the creditors given, otherwise he takes the goods subject to the debts of the seller." In this case the purchaser, Walton, had, in good faith, attempted to comply with the statute. An inventory was taken, as required by it, and he demanded of Mrs. Warfield, the seller, a list of her creditors. She gave him what purported to be a list, but the creditor involved in that case was not mentioned therein and Walton did not know that the company was a creditor of Mrs. Warfield until after the stock of goods and fixtures had been purchased and paid for by him. The creditors listed were paid in full the amounts of their

claims. Yet the court held under the rule laid down above that Walton was liable for the debt.

The statute as construed in this state certainly protects the creditor in every particular. Not only that, but under the Gunn case, *supra,* it often will actually give him more protection than he would have had had there been no sale, for although all of the money paid for the goods may have been used in the payment of creditors, the goods themselves remain liable for the debts.

On the other hand, there is no protection for the *bona fide* purchaser. No matter how much diligence he shows, no matter what degree of good faith he manifests, if the person from whom he is buying, either from carelessness or fraud, omits the name of a creditor and such creditor does not receive notice under the statute, the goods in his hands are liable to their full value, and if he has used them or mingled them with his own, he is personally liable in the same amount.

In the language of our court, "It is creditors, and creditors alone, who can take advantage of the provisions of the statute. The statute was enacted for their benefit. It has nothing to do with the question of the liability of the purchaser of a stock of goods to the seller thereof for the purchase price. Under the statute a sale of goods, wares, and merchandise is valid as to all other persons except the creditors of the seller," *Rubenstein vs. Foote-Patrick Co.,* 149 Miss. 128, 115 So. 194. "The burden of proof is upon the creditor to show that he was a creditor . . . on the date of the transfer of the stock of goods in bulk. . . . The Bulk Sales Law is in derogation of the common law, and must be strictly construed, and does not affect a subsequent creditor, unless perchance it may be that the evidence would disclose that the void bulk sale in some way affected the rights of the subsequent creditor." *Whittington vs. Yazoo Mtg. Co.,* 148 Miss. 868, 114 So. 752.

In the sale of stock belonging to a partnership, "creditors of an individual member of a partnership are not entitled to the benefit of this statute, but only creditors of the partnership are entitled to such notice." *Ellis Jones Drug Co. vs. Coker et al.,* 117 So. 545.

Our court seems to hold with the majority rule as laid down in Corpus Juris that the term "creditors" as descriptive of the persons in whose favor the statute declares the sale void is not restricted to any particular class of

creditors, but includes all persons who were creditors of the seller at the time of the sale, although their claims had not been reduced to judgment, or were not due, and although they were not creditors for merchandise, but were merely general creditors of the seller in other transactions. *(Kline vs. Sims,* 149 Miss. 154, 114 So. 871.)

In Mississippi the question of what is to be included as within the term "stock of merchandise" has arisen in only three cases. The general rule as stated in Corpus Juris (27 C. J., p. 881) with reference to fixtures is that they are not within the statute, although they are used in connection with the business.

Our court, however, held in the Walton case, *supra,* that this term "includes, not only the movable goods, but fixtures and other appliances used in connection with the conduct of the business. . . . The word 'merchandise' in the statute should be given a broad enough meaning to cover the evil the statute seeks to remedy. To limit the statute strictly to goods kept for sale would, in a large measure, defeat its purpose."

In a case decided last year *(Ellis Jones Co. vs. Coker,* 117 So. 545) this decision was questioned by counsel and the court said, "Counsel for the appellant strongly urge upon us that we reconsider and overrule the Walton case wherein this court held that the Bulk Sales Law applies to fixtures and fixtures used in the store are in the purview of the act when used in connection with the articles kept for sale and sold. In view of the conclusion reached in this case, we do not now deem it necessary to consider this question, nor do we intimate any intention now to change the rule announced in that case."

Under the general rule exempt property is not within the statute (27 C. J., p. 882, and cases cited). In the Walton case this question was raised, but not decided, as the case went off on another point, but the court indicated that a similar holding might be made in this state.

Sales between partners are not affected by this statute, as our court said, "in our opinion the statute does not apply to a sale of a stock of merchandise from one partner to another," in the case of *Parker vs. Tapscott,* 142 Miss. 768, 107 So. 561.

The sale of a restaurant is not within the statute, when the merchandise on hand is not included in the sale, for in that case what is really sold is simply the fixtures and

restaurant equipment and the good will *(Carnaggio Bros. vs. Greenwood,* 142 Miss. 885, 108 So. 141).

When a sale has been held to come within the statute and through non-compliance is fraudulent and void, then the purchaser stands in the position of a trustee of the property, responsible to the creditors for the disposal of such property. The fact that he has disposed of the property makes no difference, and in case the goods themselves can not be reached, a personal judgment against the purchaser to the amount of the debt, but not exceeding the fair value of the goods at the time of the sale, may be recovered. In fact, our court in the Gunn case said, "Where a stock of goods was sold in violation of the statute, a creditor may proceed against the property if it remains in the hands of the purchaser, or waive the tort and sue the purchaser for the value of the goods or he may pursue both remedies."

Under the general rule laid down in Corpus Juris a personal action against the buyer will not lie unless he has actually sold the property or so intermingled it until it cannot be reached, but our court gives this remedy, although the goods are still in the possession of the purchaser, under the case cited. The other usual remedies, such as sequestration, garnishment or proceeding in equity, are available to take advantage of the statute.

When one of the creditors is bringing suit to obtain advantage of the statute, he is not required to bring suit on behalf of all of the creditors, but may sue for his own demand and get the benefit of his diligence. Other creditors may intervene in the suit, but when they do so it does not entitle them to a pro rata share, but they simply take their places in line with creditors according to the date of their proceedings, and are not entitled to share in the proceeds of the first creditor's diligence. *(Kline vs. Sims, supra.)*

One of the pitfalls that has proved the nemesis of pleaders in at least three cases in this state is the allegations which are necessary to obtain advantage of the statute. An allegation of the value of the stock of goods at the time of the sale is one essential element of the declaration. Although proof is introduced at the trial proving without dispute the value of the goods, a peremptory instruction for the plaintiff will be erroneous.

In reviewing the authorities in this state upon this subject in the case of *Miller-Alliare Co. vs. Hutcherson,*

147 Miss. 453, 112 So. 589, our court said, "In the present case there was no allegation of the value of the stock of goods in the declaration, and this was necessary. . . . In a suit based on alleged violation of the Bulk Sales Law, because of failure of the purchaser to give notice to seller's creditor, the fair market value of goods alleged to have been unlawfully sold must be alleged and proved, and, even though no defense was interposed, a jury should have been empaneled on writ of inquiry to ascertain fair market value. . . . The party must stand on his pleadings, and if he does not make a case in the pleadings, and lets the trial go to judgment, he cannot complain of the judgment against him where the defect is not cured by the statute of jeofails," citing *Allison & Hyde vs. Williams,* 142 Miss. 825, 108 So. 142, and *McLendon vs. Peoples Bank,* 111 So. 843.

Not only must the fair market value of the goods be pleaded to avail of the statute, but the case made out by the pleadings must clearly come within the statute. "The statute is in derogation of the common law and of the right to contract, and to bring a case within the statute the proposition which makes the sale fall within the statute should be averred, showing in substance the failure of the seller and purchaser to comply with the statute." *Parker vs. Tapscott,* 142 Miss. 768, 107 So. 561. The allegations of an ordinary fraudulent conveyance or creditors' bill do not aver the failure of the defendant to comply with the statute in definite enough terms to allow the plaintiff to take advantage of the provisions of the statute.

After having viewed this question from the standpoint of the construction of the Bulk Sales Law by the Mississippi court, it is interesting to note several of the leading cases which hold with the majority rule on one or two points from which our court differs.

The three most important points upon which the Mississippi court gives the statute a much broader construction than a majority of the courts are: (1) That this statute makes sales not carried out strictly in compliance therewith absolutely fraudulent and void and not "presumed to be fraudulent and void"; (2) that an omission from the seller's list of creditors places the sale within the condemnation of the statute, regardless of the good faith of the purchaser or his efforts to secure a true list; (3) that fixtures are included in the meaning of the phrase "stock of merchandise."

Among the leading courts holding the opposite view to that taken by our court on the first proposition are those of Oklahoma, Minnesota, Wisconsin, New York (the wording of their statute has now been changed), Massachusetts (same facts as New York), Alabama, Florida, Iowa, North Dakota and Maryland. As an illustration of their line of reasoning we might take an extract from the opinion of the Maryland court in *Hart vs. Roney,* 93 Md. 432, 49 Atl. 661, construing a statute worded exactly as ours. The court there said, "It says the sale 'will be presumed to be fraudulent and void,' unless, etc. If the legislature had intended that it should be conclusively presumed to be fraudulent it would doubtless have said so; or, if it had intended to prohibit all sales of stocks of merchandise in bulk unless these provisions were complied with, it would have used other language than that used in the statute.

"There was no reason for saying that the sale 'will be presumed to be fraudulent and void' if the legislature had intended that it should be absolutely void, unless the various requirements are complied with. The language used not only does not have that meaning, but it suggests the contrary. If anything more than the language itself be necessary to justify the construction we have placed upon it, Section 19 of this act of 1900 furnishes it. It reads: 'Except as expressly provided in the preceding section, nothing therein contained, nor any act thereunder, shall change or affect the present rules of evidence or the present presumptions of law.' It thereby declared that it was changing or affecting 'the present rules of evidence,' etc. Prior to the passage of the act, the presumption was that such a transaction was *bona fide,* and the burden was on the one attacking it to prove fraud; but the statute shifts the burden of proof, unless its provisions are complied with."

Among the cases holding similarly are *Rugen vs. Mulvihill,* 85 Misc. 354, 147 N. Y. S. 404; *Johnston Bros. Co. vs. Washburn,* 16 Ala. A. 311, 77 So. 461; *Gilbert vs. Gonyea,* 103 Minn. 459, 115 N. W. 640; *Greene vs. Robbins,* 29 N. D. 131, 150 N. W. 561; *Fisher vs. Hermann,* 118 Wis. 428, 95 N. W. 392; *Baumeister vs. Fink,* 141 Ill. App. 372; *Goldstein vs. Maloney,* 62 Fla. 198, 57 So. 342.

On the second proposition mentioned the weight of authority is to the effect that full compliance with the statute by the purchaser absolves him from liability to any creditor

who may not have received notice. The fraud of the vendor in omitting the name of a creditor from the list can not be imputed to the vendee, and he is not made to suffer for another's wrong.

As an illustration of the reasoning of these courts, among which are those of Rhode Island, Georgia, Oregon, Arkansas, New York, and Kentucky, might be taken extracts from the opinion of the court in *Coach vs. Gage,* 70 Ore. 182, 138 Pac. 847, and in *International Silver Co. vs. Hull & Co.,* 140 Ga. 10, both quoted and approved in *Glantz vs. Garniner,* 100 Atl. (R. I.) 913, L. R. A. 1917 F, p. 226. The requirements as to notice are the same in these statutes as in ours, although the question of the conclusiveness of the presumption is different.

The Oregon court says, "The act in question, in our judgment, imposes upon the purchaser (1) the duty to demand a written statement, under oath, of the vendor, of the names and addresses of his creditors, and (2) upon the receipt of such list to notify the persons named therein of the proposed purchase. For an intentional breach of either of these duties, it was entirely competent for the Legislature, by way of penalty for such breach, and to secure the faithful performance of such duty, to declare that their non-performance should constitute conclusive evidence of fraud, and render the sale void as to creditors; but it is not in the power of the Legislature to make a breach of duty by the vendor evidence of fraud in the vendee. To hold the law means that an omission of the name of a creditor by the vendor, without the knowledge of the vendee, renders the transaction void as to him, would be to hold that it was the intent of the Legislature to ordain that a fraud committed by a vendor upon the vendee by falsifying the list of creditors should be conclusively presumed to be the fraud of the person so defrauded and deceived. Such a construction would be so contrary to every principle of law and good morals that it is inconceivable that the Legislature intended it." Yet the principle condemned here is exactly what has been held by the Mississippi court in its construction of our statute.

On this point the Georgia court holds exactly contrary to our court also, for it says in the International Silver Company case, *supra,* "It was argued that the statute required the purchaser not only to demand, but also to 'receive' from the vendor a list of all of the creditors of the latter, and that he had not received a list of all of

them if one were omitted. But this is too exacting and verbal a construction. The statute did not make the purchaser a warrantor of the absolute completeness and accuracy of the sworn statement of the vendor, or punish him for the omission from such sworn statement of the name of a creditor, without any fault on his part, or any notice thereof."

In addition to the cases cited, others in point are: *Stuart vs. Elk Horn Bank & T. Co.,* 123 Ark. 285, 185 S. W. 263; *South Georgia Grocery Co. vs. Wade-Chambers Grocery Co.,* 12 Ga. App. 213, 77 S. E. 6; *Seeman vs. Levine,* 140 App. Div. 272, 125 N. Y. Supp. 184.

Finally, on the question of the inclusion of fixtures under a statute worded as ours, it is hardly necessary to refer to authorities, for the courts seem to be almost unanimous in their holding that fixtures, although used in connection with the business, are not included. Suffice it to say that citations to cases of seventeen states so holding may be found in 27 C. J., page 880. There seems to be very little reason to hold that the term "stock of merchandise" should apply to any property not kept for sale.

The only remedy which the writer can suggest for the situation in Mississippi whereby all sales in bulk are now practically prohibited, would be a simple amendment of the present Bulk Sales Law.

An additional safeguard would be given the creditor by amending section one, sub-section b, so as to require that the list given by the seller should be sworn to.

The suggested amendment would be by the addition of another sub-section to section one of the act to read as follows, to-wit: "d. But neither the goods sold nor the purchaser thereof shall be liable for the claim of any creditor of whom the purchaser had no knowledge, or with the exercise of reasonable diligence could have acquired knowledge, and whose name was omitted from such list furnished by the seller."

While this would not alleviate the entire rigor of the law as construed, it would enable a *bona fide* purchaser to exercise reasonable diligence in complying with the statute and thereby free himself from liability for debts of which he had no notice. Persons could again purchase stocks of merchandise in bulk with some degree of safety, which is now impossible under our statute.

Authorities: Hemingway's Code of 1927, Sections 3335-3338; Code of 1917, Sections 3129-3132; *Ellis Jones Drug Co. vs. Coker, et al.,* 117 South (Miss.),

545; *Rubenstein vs. Foote-Patrick Co.*, 149 Miss., 128, 115 South, 194; *Kline et al. vs. Sims et al.*, 149 Miss., 154, 114 South, 871; *Washington vs. Yazoo Mtg. Co.*, 148 Miss., 861, 114 South, 752; *Miller-Alliaire Co. vs. Hutcherson*, 147 Miss., 453, 112 South 589; *McLendon vs. Peoples Bank*, ... Miss., ..., 111 South 843; *Walton vs. Walter Fisher Co.*, 146 Miss., 291, 111 South 364; *Parker vs. Tapscott*, 142 Miss., 768, 107 South 561; *Allison & Hyde vs. Williams*, 142 Miss., 825, 108 South 142; *Carnaggio Bros. vs. City of Greenwood*, 142 Miss., 885, 108 South 141; *Zachery vs. Meridian Fertilizer Factory*, No. 18343, decided without opinion; *International Shoe Co. vs. Gunn*, 121 Miss., 679, 83 South 742; *Dean vs. Bowles*, 110 Miss., 575, 70 South 693; *Moore Dry Goods Co. vs. Rowe*, 99 Miss., 30, 54 South 659, Ann. Cas. 1913C, 1213; *Moore Dry Goods Co. vs. Rowe*, 97 Miss., 775, 53 South 626; *Phillips, etc., Mtg. Co. vs. Perkins*, 53 South 628; 27 Corpus Juris, pp. 873-892; 12 R. C. L., pp. 525-531; 2 L. R. A. (NS) 331; 20 L. R. A. (NS) 160; L. R. A. 1915E, 917; 2 R. C. L. Supp., p. 1443; 4 R. C. L. Supp., 761; 5 R. C. L. Supp., 649; 6 R. C. L. Supp., 714; 15 R. C. L., 529; 25 L. R. A. (NS) 758; 45 L. R. A. (NS) 495; 39 L. R. A. (NS) 374; L. R. A. 1916B 974; 41 L. R. A. 1478; L. R. A. 1917F, 230.

CONSENT DECREE AGAINST INFANTS

By Dugas Shands, Student

The decisions of our courts at large are much in conflict upon this question. Many of the decisions are based, not on a general principle of law, but upon the peculiar circumstances of each case, resulting in decisions which are not consistent with the broad principles underlying this question.

The policy of Chancery has ever been to protect infants and to require those dealing with them, and those acting for them, to exercise the utmost good faith in every transaction. In view of the many disabilities attached to infancy, which are at once recognized by law, the infant is considered as incompetent to protect his interest, as is a non-compos. In adjudicating his rights and liabilities the Chancellor must act in a dual capacity—first, as a guardian of the infant,[1] and secondly, as a judge of his rights and liability upon the law and facts.

Another limitation placed upon an infant is that, he cannot appear or plead by an attorney;[2] he must do so by his general guardian, or by a guardian *ad litem,* or by next friend, depending in whom the authority to represent the infant is vested—such does not deprive the infant of professional aid of an attorney, and hence, when the infant is properly represented by next friend, or guardian *ad litem,* the conduct of the prosecution or defense may be carried on by the attorney, and the effect of the appearance of attorney is on the same footing as the appearance of any other litigant—provided the infant has been properly served with process.[3] Such guardian must throughout the proceedings protect and preserve the interest of the infant.[4]

The authority and power of the attorney representing the infant and guardian are limited to those possessed by the guardian *ad litem,* or next friend.[5] The attorney can-

1 Northern et al. vs. Scruggs, 79 So., 227, Key No. 33 Infants.

2 Lee vs. Jenkins, 30 Miss., 590; Thurston vs. Tubbs, 250 Ill., 540, 95 N. E., 479; Williams vs. Ewing, 31 Ark., 229; Hope vs. Shevill, 122 N. Y. S., 127-Aff. 204 N. Y., 563-Eng.; Hindmarsh vs. Chandler, 7 Tount 488.

3 Hart vs. Hunter, 114 S. W. 882, 31 C. J., Sec. 315, Infants.

4 Memphis Stone and Gravel Co. vs. Archer, 82 So. 315.

5 Heiter vs. Joline, 119 N. Y. S., 819; Wileman vs. Metropolitan Street Ry. Co., 80 N. Y. S., 233.

not waive,[6] or admit away any substantial rights of the infant, or consent to anything which may be prejudicial to the infant.[7] The case of *Eidam vs. Finnegan,* 16 L. R. A. 507, exemplifies the principle that an agreement by an attorney affecting rights of infant must first be approved by the court before it binds the infant.

Thus the cases hold that the relation as to agreements affecting the rights of infants, between guardian *ad litem* and an attorney is analogous, as both must act for the infant, and protect and preserve the interests of the minor throughout the proceedings.[8] From a study of the older cases, we find the courts jealously guarding the interests of minors, and the weight of authority was to require either, a reference to a master, or a finding upon facts by court and an affirmative finding of benefit to infant, before a consent decree taken by or against an infant would withstand a collateral attack.[9] The power of representatives of minors to bind them by consent judgments or decrees has been denied where the interests of the infant were prejudiced.[10] In the case of *Litchfield vs. Burwell,* 5 How. Pr. 341, the court refused to bind an infant by a consent judgment by attorney of guardian *ad litem.* In *Bennett vs. Bradford,* 132 Ill. 269, the infant was not bound by a consent decree of his attorneys.

The weight of authority seems to hold that consent decrees against infants are binding under certain conditions. Thus the United States Supreme Court rule places a greater burden on the Chancellor and is a relaxation of the strict rule concerning infants in this respect.

The leading case reporting this line of authority is *Thompson vs. Maxwell Land Grant Co.,* 168 U. S. 451, in which are involved rights of infant defendants, where a guardian *ad litem* had consented to a sale of their land, upon advice of her attorney. The courts, speaking through Justice Brewer, say "that infants are bound by a consent decree is affirmed by the authorities, and this notwithstanding that it does not appear that a prior inquiry was made by the court as to whether it was for their benefit." In 1 Dan. Pl & Pr. 163 it is said: "Although the court

6 Frazier vs. Frazier, 137 Ark., 57, 207 S. W. 215; Jepperson vs. Mich., 213 Ill., 488, 77 N. E. 1114.

7 Eidam vs. Finnegan, 16 L. R. A. 507.

8 Memphis Stone Gravel Co. vs. Archer, 82 So. 315.

9 Consent decrees, 32 L. R. A. 675.

10 Consent decrees, 32 L. R. A. 675; Johnson vs. McCabe, 42 Miss., 255; Walton vs. Coulson, 1 McClain 220; Edsall vs. Vandermark, 39 Barb. 598; McClure vs. Farthing, 51 Mo., 159; Losey vs. Stanley, 147 N. Y. 560.

usually will not, while infants are concerned make a decree by consent without an inquiry whether it is for their benefit, yet once a decree has been pronounced without that previous step, it is considered as of the same authority as if such an inquiry had been directed, and a certificate thereupon made that it would be for their benefit. In the same manner, an order for their maintenance, though usually made after an inquiry, if made without, would be equally binding. An infant is as much bound by a decree made against him in equity as a person of full age; therefore if there be an absolute decree made against an infant defendant who is under age, he will not be permitted to dispute it, unless upon the same ground as an adult might have disputed it; such as fraud, collusion, or error."

In *Walsh vs. Walsh,* 116 Mass. 337, a decree had been entered as fallacious; "And the plaintiffs and defendants —Thomas Keys—and also in his capacity as guardian *ad litem* of Bridget Walsh and William Walsh, consenting to following decree; And this court being satisfied upon the representations of counsel that the decree is fit and proper to be made against the said Bridget and William; it is therefore ordered, adjudged and decreed," etc. On a bill of review filed by the minors this decree was challenged, among other reasons, on the ground that it was made by consent of their guardian *ad litem* and upon representation of counsel without proof. The court decided against the contention, and speaking in reference thereto, through Mr. Chief Justice Gray, said, "An infant is ordinarily bound by acts done in good faith by his solicitor or counsel in the course of the suit, to the same extent as a person of full age. *Tillolson vs. Hargrave,* 3 Mass. 494; *Levy vs. Levy,* 3 Mass. 245. And a compromise appearing to be for the benefit of an infant, will be confirmed without a reference to a master; and if sanctioned by the court, cannot be afterwards set aside except for fraud. *Lippiat vs. Holley,* 1 Beav. 423; *Brooks vs. Mastyn,* 33 Beav. 457, and 2 D. G. J. & S. 373.

If the court does pronounce a decree against an infant by consent and without an inquiry, whether it will be for his benefit, he is as much bound by the decree as if there had been a reference to a master and a report by him that it was for the benefit of the infant. *Wall vs. Bushley,* 1 Bro. Ch. 484; 1 Dan. Ch. Pr. 164. The case falls within the general rule that a decree made by consent of counsel, without fraud or collusion, cannot be set aside by rehear-

ing appeal or review. *Webb vs. Webb,* 3 Swanst 658; *Harrison vs. Rumsey,* 2 Ves Ten. 488; *Brandish vs. Gee,* Ambl. 229; T. C. 1, Kenny 73; *Downing vs. Cage,* 1 Eq. Cas. Ab. 165; *Toder vs. Sansom,* 1 Bro. P. C. (2nd Ed.) 468; *French vs. Shotwell,* 5 Johns. Ch. 555.

Ordinarily indeed the court, before entering a consent decree, will inquire whether the terms of it are for the interest of the infant. It ought in all such cases to make the inquiry, and because it is its duty to do so, it will be presumed, in the absence of any showing to the contrary, that it has performed its duty. Where a decree fails to mention such an inquiry, there is nothing to indicate that it was not made accordingly.[11]

The minority rule holds that an infant is not bound by a judgment or decree rendered against him by consent without evidence. In the case of *Bennett vs. Bradford,* 24 N. E. 63, the Supreme Court of Illinois, speaking through Scholfield, Justice, takes up the sole question of whether a consent decree without evidence against an infant, entered into by the attorneys, is valid. "We have a decree against minors by consent without evidence; and this as against minors, is always error (citing numerous authorities). Accord.[12] The case of *Robinson vs. Floesch Const. Co.,* 236 S. W. 332, is a well considered case supporting this line of authority.

The courts of Mississippi have never passed squarely on the question under consideration. There are, however, two Mississippi cases remotely connected—*Johns vs. Harper,* 61 Miss. 142, and *Gunsdofer vs. Gundy,* 72 Miss. 312, 16 So. 432.

In the Harper case, 61 Miss. 142, a bill was filed by the infants by next friend to re-open a decree in which they were complainants. The court, speaking through Chalmers, Justice, dismisses the original bill in a short opinion, stating in effect that a decree rendered in an infant's favor on a bill filed in his name by next friend, cannot, in the absence of fraud, be re-opened by the infant, whether real or personal estate is involved, and is as binding on him as an adult.

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11 Franklin Savings Bank vs. Taylor, 53 Fed. 854; Glover vs. Bradley, 233 Federal 721, 147 C. C. A. 487; Burke vs. Northern Pacific Ry. Co., 149 Pac. 335 Rankin vs. Sholfield, 71 Ark., 168, 66 S. W. 197; Missouri Pac. vs. Lasca, 79 Kans., 311, 99 Pac. 616; 21 L. R. A. (N. S.) 338.

12 Dunning vs. Stanton, Ala. 9 Port 513; Carroll vs. Atlantic Steel Co., 151 Ga., 378; 15 A. L. R. 660. important note; Missouri Pac. Ry. Co. vs. Lasca, 79 Kans., 311, 99 Pac. 616; 21 L. R. A. (N. S.) 338; number of authorities and note; Macklin vs. Wilds, 106 La., 1, 30 So. 257.

In the Gunsdofer case, 72 Miss. 312, a like situation exists, and Whitfield, Justice, speaking for the court, says, "This is not a bill of review. We have nothing in the former record before us except the decree. . . . The decree was manifestly erroneous; but the question here is not one of error or no error. The Complainants here were jointly with the adult heirs, complainants in the bill resulting in said former decree—actors therein, affirmatively invoking the jurisdiction of the court. No fraud or collusion is alleged, and whilst it is alleged that these complainants thought the personalty was the property of themselves and their adult co-complainants, and thus mistook their legal rights, that bare statement is all that appears on that subject." "We think the case is governed by *Johns vs. Harper,* 61 Miss. 142."

In Griffith's Chancery Practice, Section 533, "Substantive Admissions against infants not allowed," and footnote, the limitations on admissions of guardian *ad litem* are well discussed. At Section 619 and footnote, Chancellor Griffith has suggested that because of the close analogy between the relation of infant and guardian *ad litem,*[13] and infant and attorney, that the only safe practice, unless infants be complainants and recover practically all they sue for, is to ask a reference to a master, or proof in open court.

In conclusion I might add that in case of infant defendants, Griffith's statement would seem to be doubly true in Mississippi practice.

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13 Ingersoll vs. Ingersoll, 42 Miss., 155; Johnson vs. McCabe, 42 Miss., 255; Ferguson vs. Crowson, 25 Miss., 433; Belt vs. Adams, 124 Mishs., 194, 86 So. 584; Cully vs. Rhodes, 124 Miss., 653, 87 So. 136; Memphis Gravel Co. vs. Archer, 120 Miss., 453; Pruett vs. Land, 36 Miss., 495; Price vs. Crone, 44 Miss., 571; Miller vs. Palmer, 55 Miss., 343.

LEGAL ETHICS

By Beverly C. Adams, Student

What is legal ethics? Often we have heard of lawyers being admonished for being unethical in their practice. We have also heard of members of the medical profession committing acts which were contrary to the practices of that profession, and branded "unethical." Likewise we know that there is an academic study called "ethics." Having all these things confused in his mind, it is hard for a young lawyer to grasp just what is meant by the term "legal ethics."

Before going into this, however, let us consider momentarily the academic conception of ethics. In looking at the derivation of the word we find that it originally meant character, or that which relates to character. Upon this basis has been formed many theories and schools of ethical thought. All of these may be condensed into the general conclusion that "Ethics is the sum of the aggregate of the rules of duty, or of right living." A dictionary definition of the academic term is, "the science of human duty or of basic principles of life based on right actions."

1. What Is Included in Legal Ethics?

From all this, then, we would gather that legal ethics means in a general way the guide for the proper conduct of a lawyer. Generally, this is not meant to apply to lawyer in private life as citizens. While it is admirable and commendable for an advocate to have—both in and out of court—those sterling qualities of righteous living, such as truth, sincerity, honesty, fidelity and the many other fine virtues which go to make up a true gentleman, yet, generally speaking, legal ethics does not extend to these nor any acts committed outside the practice of law. Statutes in some states, however, change this general rule and make certain acts or crimes committed by an attorney so great that he will be disbarred. Mississippi follows this rule in the case of an attorney being convicted of a felony.

It is the opinion of the writer that the practice of disbarring lawyers for acts committed outside of the practice

of law is a good one, when it is exercised reasonably. It tends to uplift the profession by ridding it of the lower elements of society which might have mental capacity to pass the examinations, but who do not have the character to administer justice among our people.

In consideration of the principles just set out, then, the advocate is regarded as being charged with a number of distinct professional obligations and duties to society and certain of its members. This discussion in the remaining sections will deal with the subject from the standpoint of these duties, which may be enumerated as: duty of the lawyer to the public, duty of the lawyer to his client, duty of the lawyer to the court, and duty of the lawyer to the bar.

2. Duty of the Lawyer to the Public

Now that we have a general conception of the scope and meaning of the term legal ethics and of the principles governing it, let us consider in detail the duty which a lawyer holds toward the public.

There are no statutes which have set this out specifically and adequately, because it is impossible "to prescribe rules which shall determine an attorney's duty or dictate his action in the varying phases of each particular case, and about all that can be said is, that he should be guided by the recognized usages of his time, and the prevailing moral sentiment." These prevailing moral sentiments and recognized usages, then, plus certain individual acts decided in cases and provided by statutes, form the basis for this phase of the work.

A general statement of the duties of the lawyer to the public may be found in the oath which the lawyer takes when he is admitted to practice before the courts (Sec. 215, Code of 1906):

"I do solemnly swear that I will demean myself, as an attorney and counselor of this court, according to the best of my learning and ability, and with all good fidelity as well to the court as to the client; that I will use no falsehood nor delay any person's cause for lucre or malice, and that I will support the constitution of the state of Mississippi so long as I continue a citizen thereof. So help me God."

The prime duty of the lawyer to the public is to see that justice is done and that injustice is suppressed. This duty logically falls upon an attorney when it is remem-

bered that he is a public servant. He is even more, he serves the individuals who compose the body politic, and then he serves the state. He not only practices in the courts, but is himself a part of the judicial machinery, and as such is subject to a disciplinary power from which the members of the other professions are exempt. This duty is provided for in the oath of the lawyer and in another statute (Sec. 216, Par. 1), which makes it the duty of the lawyer "to support the constitution and laws of this state and of the United States."

Another duty which the lawyer owes the public is to take care that the desire to maintain the interests of his client does not do injury to the public. Mississippi has a statute which partially expresses this duty (Sec. 216, Par. 3, Code of 1906), as follows, "to employ, for the purpose of maintaining the causes confided to them, such means only as are consistent with truth, and never to seek to mislead by any artifice or false statement of the law." Illustrations of such misconduct are such as seeking to mislead by presenting false law or facts, by tampering with the jury, or by exercising personal influence on the judge.

Then, too, the idea of a lawyer not pushing himself on the public by bold advertising, such as circular letters and long advertisements, has become so embedded in the principles of the best attorneys, that it has become a duty to follow it. There is no place for high-pressure advertising in the legal profession. The best advertisement that a lawyer can get is display of ability and his continued right living. It is permissible, of course, to have professional cards and to send out notices of additions to the firm, but this practically is the end of such.

Another practice which has been followed so long that it is now a duty for a lawyer to follow, is that of not pursuing business, as if he were a real estate agent. Often lawyers go to persons who have a cause of action and endeavor to make them litigate the matter. This is obviously contrary to the ethics of the profession as has been expressed by a Mississippi statute (Sec. 216, Par. 6, Code of 1906), which declares that it shall be the duty of a lawyer "to encourage neither the commencement nor continuance of an action or proceeding from any motives of passion or personal interest."

Another duty of a lawyer, and one which he finds hard to comply with, is "never to reject, for any consideration

personal to themselves, the cause of the defenseless or oppressed" (Sec. 216, Par. 7, Code of 1906). When the court appoints a lawyer to defend a defenseless criminal, it is the duty of that attorney to at once take up the trial and to pay it full attention, just as though he were receiving compensation therefor. In every instance the lawyer should first take into consideration the public, next his client, and third, himself.

3. Duty of Lawyer to His Client

The duty of the attorney to the client is obviously a very important division of the study of legal ethics, when the relation between these parties is considered. The essential features of this professional relation is the fact of employment to do something in the client's behalf. An attorney is primarily the agent of his client. As a matter of fact, the word "attorney" means an agent, and the general principles controlling matters of agency control also the relation of attorney and client.

One of the greatest duties which an attorney owes his client is to maintain inviolate the conversations and information given him by his client during the course of his employment. The reason for this rule, of course, is on account of the confidential relation which exists between the attorney and client. This duty is made a rule in this state by Sec. 216, Par. 4, Code of 1906, which states that it shall be the duty of the attorney "to maintain inviolate the confidence, and, at every peril to themselves, to preserve the secrets of their clients."

A corollary to this rule is that an attorney should not accept an appointment from an adverse party to his client. This holds true even after the attorney has finished his job with his former client, if the later position is accepted for the purpose of taking advantage of his former client by the privileged communications which he received from him during his employment.

Also, an attorney owes the duty to his client to give him the best advice in an honest manner which he is capable of giving. When information is sought from a lawyer, the law of the state as it then exists should be given. No lawyer has the right, in the discharge of his professional duties, to involve his client by his advice in a violation of the law; and he becomes implicated in his client's guilt, when, by following his advice, a crime against the laws of the state is committed. The mere fact that he

acts in the capacity and under the privileges of counsel does not exonerate him from the well-founded legal principle which renders all persons, who advise or direct the commission of crime, guilty of the crime committed by compliance with the advice or in conformity with the direction which may be given. The whole duty of the lawyer, then, in a case of this kind is to refuse to give advice or pass it on to some other lawyer, if he does not have sufficient learning to advise on the particular point inquired into.

Closely connected with this duty is the fact that an attorney is not bound to take a case, but after he does take it, it is his duty to see it through, to carry it to an end. This is to be done with the utmost skill and learning which he possesses. As Warvelle expresses it, "a counsel discharges his moral as well as legal duty when he brings to a case his best learning, ability, and skill."

In conducting a case, the lawyer may do everything for the client which the client could do for himself, and it is his duty so to do. It is the duty of the lawyer to set up "any defense which the law affords to a party, any shield which extends to him, any excuse which it may furnish." This is true, "no matter how improper such use may seem to the moralist, if the law sanctions it no blame can rest on the attorney for the results therefrom." But, on the other hand, the attorney should not go beyond his professional duty in such cases, as he will oftentimes be asked to do. If he knows such requests are without just grounds, and, hence, illegal and which are inspired by malicious motives, he, as a matter of duty, should refuse to do it.

Another strong duty which an attorney owes his client is to obey the instructions given him. At times such instructions will be contrary to what the attorney thinks should be done. When such cases arise, "it is better . . . as a matter of expediency to follow the instructions of the client." If the attorney proceeds to act on his own views and according to his own ideas, notwithstanding that he may be under the honest impression that he would best promote the interests of his client by such a course, if loss occurs, he is both legally and morally liable. From this viewpoint, then, it is obvious that it is the duty of the attorney to carry out the instructions of his client.

Another phase of the relation of lawyer and client, which might be termed a duty, is that situation where the

attorney bargains with the client while the relation exists, and thereby secures an advantage. This result will be attributed to the use made of the relation between them to the extent of undue influence and the attorney will be stripped of the advantage thus gained by the transaction being set aside. Such transactions are scrutinized very carefully by the courts, and it is a duty of the attorney not to take advantage of his client in this manner.

5. Duty of Lawyer as to Funds of Client

Where the attorney collects money for the client or has in his possession money of the client in the course of his professional employment, such money belongs to the client, and the attorney is regarded as the trustee of it. As in other cases of trusteeship, it is the duty of the attorney to exercise the same caution with respect to his client's money that a prudent man would display in respect to his own. If this is done and a loss occurs, then the attorney is not liable, but if such is not the case, he will be liable for any loss of the money. Another interesting point with regard to this is when a lawyer deposits his client's money in the bank, if he places it in his own name as his personal account and for any reason the money is lost, the attorney must bear such loss; but if he deposit in the capacity of attorney for his client, the loss will be on the client.

It is the duty of the attorney to pay over the funds to the client as soon as possible after he secures them. Some states make such mandatory, with the penalty of disbarment for failure to comply. If the attorney should go further and misappropriate the client's funds, he will be treated as an ordinary thief. Although a less offense, it is considered a breach of duty for the lawyer to neglect or to temporarily use for his personal benefit his client's funds.

It is conceded, however, that an attorney may retain such part of the funds as are required to cover the expense of the case and his own fees. Even in this case, however, if it tinges upon unfairness, it will be vacated upon objection of the client seasonably made—even though he assent at the time. From all this we see that the attorney owes the greatest duty to his client to carefully watch over, preserve, and pay over the funds which come into his hands during the course of employment.

6. Duty of Lawyer to the Court

As a general rule, the judge of a court is a person highly educated in law and of high moral character. The court is the place, and the only place, where adjudication can take place. For these reasons, its dignity should be maintained, so that it may command the respect of the populace. Who should be more alert to guard this dignity than the officer of the court—the lawyer?

The attitude of the lawyer to the judge, both in and out of court, is a large contributor to the degree of respect which is held for the court. It is, then, the duty of the lawyer to be courteous to the judge, even though the misfortune has happened of having a very weak and incapable person on the bench. This is expressed by statute in Mississippi (Sec. 216, Par. 2, Code of 1906) as a specific duty "to maintain the respect due to courts of justice and judicial officers." It is not denied that an attorney may criticize opinions of judges, both in and out of court, at the time the decision is rendered and ever afterward, without violating any canon of ethics or subjecting himself to discipline. The only limitation of this right is that such criticism should be made in good faith and in respectful language, and should not be designed to willfully or maliciously misrepresent the position of the court, or tend to bring it into disrepute, or lessen the respect due its authority. It should be guarded against, however, lest every loser in a case "cuss" the court.

Still another very important duty which the attorney owes the court is that he shall not attempt to deceive it. It is gross unprofessional conduct on the part of an attorney to attempt to pollute the administration of justice by a resort to any form of device for the purpose of preventing the decision of a cause upon its merits or of influencing the court to render a decision which it would otherwise have made. Misstatements of law or fact with intention of deceiving the court are considered as breaches of duty of the attorney to the court. There is a Mississippi statute expressing this same idea which has above been quoted.[1]

A somewhat delicate situation arises when a client consults his attorney as to the validity of an order of the court, or of a writ issued under its authority, which directly affects the client's interests. In such a case it is not only the right but the duty of the lawyer to advise

1 Section 216, Par. 3, Code of 1906.

his client whether or not such order or writ is illegal and to use every legal means to secure to the client every legal right, remedy and advantage to which he may think him even probably entitled. If the lawyer demeans himself properly in so doing, and if he acts in good faith, he will not be liable for contempt because his idea is a mistaken one.

7. Duty of Attorney to the Bar

In considering this question it is well to note that the relation of the members of the bar is that of brotherhood. "Advocates," in early legal history, "were not simply members of a learned profession, but of a distinct order of society, establishing by civil authority, constituting a fraternity with settled rules and usages." Although this idea is not quite as strong today as it was then, it still remains in part as a glowing memorial to that splendid relation between attorneys in the early history of English jurisprudence. With such a relation existing, then, it is only natural that relations between members of the bar should be those of amity, good-will, and mutual esteem. This leads up to the rule that even though attorneys are antagonistic to each other, or rather on opposite sides of a case, that they do not take upon their shoulders the ill feeling of their clients and that they maintain toward each other during the trial the greatest courtesy. In Mississippi a statute says it is the duty of a lawyer "to abstain from all offensive personalities, . . ."[2]

There are still other exemplifications of professional courtesy which is very admirable, although there are no actual rules on them. This includes such incidental matters in a pending trial that do not affect the merits of the cause or work a prejudice on the rights of the client, as refraining from forcing the opposite attorney to trial when he is under affliction; forcing trial on a particular day, to the serious injury of opposing counsel; refusing to extend time for pleading, for refusing to sign bills of exception, and other similar matters.

Then, too, there is the phase to such courtesy of services which are rendered to fellow members of the bar and what, if any, charges should be made to them. It is generally considered where the services rendered as negligible that no charge is made, but where there is really an intricate problem and a large amount of work required, the other attorney should be charged as any other client. It

2 Section 216, Par. 5, Code of 1906.

is the general practice to make no charge for winding up estates of deceased lawyers, nor for other services to the widows of lawyers. Often a less price is charged to lawyers for services than would ordinarily be charged to a layman.

Another very fine quality for a young lawyer, which borders very closely upon a duty, is that of deference and respect for the older members of the bar. This does not mean that the young lawyer should not fight an old lawyer to the last ditch in a case, but such respect is a mark of a gentlemanly young lawyer, and the lack of it points to him as being very uncouth.

Now, another duty which an attorney owes to his brothers of the bar is that of being faithful to his agreements. Besides the moral wrong of willful falsehoods, there is the great consideration of loss of trust of the other members of the bar—a thing to be very highly valued. Only one or two of such instances of a lawyer breaching faith and the whole local bar will not make an agreement with him. This will, at times, certainly work a great hardship upon the lawyer. This penalty is so severe that this can be put down as almost a mandatory duty.

Finally, we reach the problem which confronts the attorney when a person has dismissed or is considering dismissing his present attorney and contemplating getting another one. After the acting attorney has been dismissed, it is considered quite proper for another lawyer to accept the place without hesitation. On the contrary, however, there are times when a client, for no good cause, becomes dissatisfied with his attorney and thinks that he is neglecting his interests. Feeling this way, he takes the problem to another attorney. It is then the duty of this last attorney to advise the prospective client in an honest and manly way that his fears are unfounded and that his attorney is faithfully discharging his duty, if such is the case. "There is no other course consistent with honorable professional character of fair dealing, and a man who acts otherwise must not only sink in his own estimation, but in the estimation of all his professional brethren, to whom the facts shall certainly become known."

In case a person does discharge his counsel and another lawyer is appointed, and there are unsettled fees or a contingent interest, these things must be settled so that the former attorney will not be prejudiced by the removal. The duty to see that this is done devolves upon

the second attorney. The entire duty of fair dealing in such a case, however, does not fall on the second attorney —the first one also has some duties to perform. It is the duty of the first one to turn over all necessary information and papers. This does not, of course, include such papers as briefs of authorities. If such is desired, there must be additional compensation for them. It is a well-settled rule that in no event would the first attorney be justified in withholding information proper to be communicated or necessary to be known by the second attorney in order to carry on the case.

8. Should a Lawyer Take a Case for a Client Whom He Knows Is Guilty?

It is considered ethical for a lawyer to take a case of a person who is guilty and who he knows to be guilty, but he must be careful of his tactics in carrying out the case. A person, whether guilty or not, has a right to be heard and a right to have counsel, and when a lawyer is taking the part of a guilty person he is merely acting in his capacity as an officer of the court and helping the individual to get his constitutional right of a fair and impartial trial. When the lawyer does more, however, when he perjures witnesses on the stand, when he uses foul money as an incentive to the jury to decide for the defendant, or when he brings in oppressive means on the presiding judge or judges, then the very heart of legal ethics has been trampled upon and pressed into the sod.

Let it not be understood by these remarks that a lawyer must take any case which comes to him; such is not his duty. When he does take it he should pursue it to the end, giving the client advantage of every legal right that he has, but not stepping over into the boundary which is marked "illegal."

RES GESTAE IN MISSISSIPPI*

By Jason H. Floyd, Student

Outline Adhered to in This Work

I. Definition.

II. General Discussion:
  1. Nature and admissibility of res gestae.
  2. Grounds for admission of parts of res gestae.
  3. Connection with subject matter of litigation.
  4. Time of utterance of statement—
    a. Before transaction.
    b. During transaction.
    c. After transaction.
      (1) Mississippi follows the strict rule.
  5. Person making statement—
    a. Accused.
    b. Injured.
    c. By person incompetent to testify.
  6. Acts as part of the res gestae.

III. Subject Matter of Declarations Which Have Been Admitted as Part of the Res Gestae:
  1. Declarations as to bodily feeling.
  2. Declarations showing condition of the mind.
  3. Declarations showing motive or intent.
  4. Declarations by possessors of personal property.
  5. Declarations admitted that are made by those in possession of real property to show its character.
  6. Declarations of agents.

The words, "res gestae," are Latin words meaning *things done.* Taken in its larger sense, as applied to legal matters, the res gestae comprehends everything that is a part of the particular transaction under consideration.

* Selected as the best paper from second year class in Evidence.

However, in this discussion, very little but the admissibility of declarations of statements which form a part of the res gestae will be considered. "It is difficult, if not impossible, to lay down any precise general rule as to what acts and declarations are admissible in evidence as part of the res gestae, and from this inherent difficulty questions in relation thereto, must, to a great extent, be left to the discretion of the lower court, and the superior court will defer much to the discretion of that court."[1] There are certain well-settled bounds upon the admission of this class of evidence, the disregard of which will be a reversible error. What declarations are admissible as part of the res gestae are described in Ruling Case Law under "Evidence," as follows: "All declarations or explanations uttered by parties to a transaction which are contemporaneous with and accompany it, or which are made under such circumstances as will raise a presumption that they are the spontaneous utterance of thoughts created by or springing from the transaction itself, and so soon thereafter as to exclude the presumption that they were the result of premeditation or design, and which are calculated to throw light on the motives and intention of the parties are admissible in evidence as part of the res gestae." Jones on Evidence gives this rule: "The declarations are admitted when they appear to have been made under the immediate influence of some principal transaction, relevant to the issue, and so connected as to characterize and explain it. It must be a part of the transaction, and must illustrate and explain it.[2] Thus, generally, the requisites of a declaration before it may be admitted in evidence as part of the res gestae are: (1) Declaration must be made under the immediate influence of the act, (2) must be a part of the transaction,[3] and contemporaneous with it,[4] (3) must tend to illustrate and explain the transaction,[5] (4) must be made without premeditation or artifice,[6] and must be made spontaneously. In *Meek vs. Perry, supra,* the statements were made during the transaction, yet they were held inadmissible. The court said: "If from the experienced connection between the circumstances and the situation of the declarant and

1 Meek vs. Perry, 36 Miss., 190.
2 Meek vs. Perry, supra; Holmes vs. Murdock, 34 Miss., 275.
3 Lewis vs. State.
4 Meek vs. Perry, supra.
5 Fulton vs. Fulton, 36 Miss., 517.
6 Meek vs. Perry, supra.

of human conduct under like circumstances, the declarations are most likely the result of contrivance and a fraudulent design to conceal the truth, they are inadmissible as part of the res gestae." This shows the necessity of spontanuity.

Anything not having the above requisites is inadmissible as being mere hearsay. The admission of declarations is a violation of the right of a defendant to be confronted with the witness, and allows testimony to go to the jury without the sanctity of an oath. Thus this class of evidence should be admitted with caution. The reason it is admitted is to explain and illustrate the acts which they accompany, which often could not be correctly interpreted to the jury in any other manner.

Although this type of evidence should be closely scrutinized, it is nevertheless of great value to the jury. The theory upon which the declarations are admitted is that they are verbal acts, explaining the transaction of which they are a part.[7] They being an act, so to speak, they may be detailed on the stand by another. In *Mayes vs. State,* 64 Miss. 329, it was said as to the theory upon which this class of evidence was admitted: "The true ground for the admission of statements as a part of the res gestae is that the statement is a verbal act, illustrating and explaining, or interpreting such thing, not that such statement will throw light upon the transaction under investigation, or that it was made so soon after the occurrence as to exclude the presumption that it has been fabricated, or that it was made under such circumstances as to compel the conviction that it was true." Although the court in this instance seems to place emphasis on the fact that the declaration was made under circumstances that will make it a verbal act, the fact that the declaration was made under the immediate influence of the transaction so as to compel the conviction that it was true, must have influenced the courts in allowing this type of evidence. The fact that the declaration was spontaneously made and without design takes the place of putting the declarant under oath.

As the declaration must be a part of the transaction, the time of the utterances of the declarations must, on principle, be during the transaction. Of course, the transaction may be long or short, lasting but a few moments or for many weeks.[8] There may be declarations made

7 Mayes vs. State, supra; Lewis vs. State, supra.
8 Lewis vs. State, supra.

before the direct act in controversy, but so connected with it as to be a part of the transaction. Thus we have the classification of (1) declarations preceding, (2) contemporaneous with, and (3) subsequent to the direct act.

In *Nelson vs. State,* 129 Miss. 486, it was held an error to admit statements of the deceased to officers several days before the killing, asking for protection. In *Goodal vs. Stewart,* 65 Miss. 157, it was held that statements made months before the act in controversy were inadmissible. In *Newcomb vs. State,* 37 Miss. 383, it was held that threats made by deceased, and not communicated to the accused before the conflict, are not admissible. In contrast to the above, but not in conflict with, is the holding of the court in *Bell vs. Morrison,* 27 Miss. 68: "A declaration by plaintiff made on the day he was assaulted before such assault, and whilst on his way to the place where he was assaulted, to the effect that his purpose in going there was to get a load of cotton for his flat-boat, was competent, there being no evidence that plaintiff contemplated any difficulty with the defendant." The court must have held the declaration to be a part of the transaction it preceded, and a verbal act. In *Gibson vs. State,* 16 So. 298, it was held that where on a prosecution for homicide it appears in evidence that the deceased procured a pistol and followed the defendant at bar to the spot where he met his death, the words, "You had better go, or I am either going to whip you or kill you," uttered by the deceased immediately prior to the time when he possessed himself of the weapon, are admissible in evidence as a part of the res gestae, as illustrating and disclosing the purpose of the subsequent acts of the victim of the tragedy.

Of course, the great majority of the declarations admitted are made contemporaneous with the act in controversy. The declaration must appear to have been made at the time the act was done, which they are supposed to characterize.[9] In *Mobile Ry. Co. vs. Stinson,* 74 Miss. 453, it was held that statements as to how the fire originated were admissible a day after it was caught, if the fire was still burning and doing damage when the statement was made.[10] As to acts contemporaneous with the transaction which are a part of the res gestae, in *Tucker vs. State,* 103 Miss. 117, it was held that evidence that at the time of the burglary charged, an iron safe in the house was

9 Meek vs. Perry, supra; Holman vs. Murdock, supra.
10 Y. & M. V. Ry. Co. vs. Jones, 73 Miss., 229.

blown open with dynamite, and the money therein stolen, was admissible as part of the res gestae, though the indictment charged nothing about the blowing open of the safe. In *Smith vs. State,* 144 Miss. 873, it was held that proof of circumstances while defendant and companion were hiding liquor, near a place where officers were lying in wait, including the fact that defendant had a pistol, were competent as part of the res gestae. In *Boatwright vs. State,* 143 Miss. 676, it was held that on prosecution for shooting at officers, when they were attempting to arrest defendant for having in their possession kegs of whiskey, such articles were admissible as part of the res gestae. In *Magee vs. State,* 145 Miss. 227, it was held that in a prosecution for murder where there were no eye-witnesses, and where the attention of others was attracted by shots, followed by the outcry of the person shot, "Somebody come here, my wife killed me," is admissible as part of the res gestae.

Except for two apparent exceptions, the Mississippi Supreme Court has held that declarations made after the transaction in controversy are not admissible. *Meek vs. Perry, supra,* while not decided on the point of contemporaneousness, states: "The principal points of attention upon the admissibility of declarations as part of the res gestae are whether the circumstance and the declaration are contemporaneous, etc." In *Sims vs. Forbes,* 86 Miss. 412, it was held that evidence of the statement of the defendant sued for personal injuries, in an interview with the plaintiff after the accident, that he blamed himself, was not admissible. In *Moore vs. Ry. Co.,* 59 Miss. 243, in an action against the railway company for personal injuries, testimony that the engineer in charge of the locomotive seven minutes after the injury said, "How in the hell can a drunken man see a drunken man?" is not admissible as part of the res gestae. In *Brown vs. State,* 78 Miss. 637, it was held that a statement by the injured forty-five minutes after being shot that accused shot him, is not admissible. In *Alabama Great Sou. Ry. vs. Shannon,* 109 Miss. 230, it was held that where plaintiff's son and a companion went to sleep on the railroad track and were hit by a train, which killed the plaintiff's son and injured the companion, when they were picked up thirty minutes after the accident, that companion's statement of what happened was not admissible even while he was still under the excitement of the occurrence, if there was no evidence to the

effect that the declarant was still under the stress of the excitement. In *Haney vs. State,* 129 Miss. 486, it was held that a statement of a person shot, a minute or two after the shooting, in the absence of the accused, to the effect that the accused shot him, and shot him for nothing, is merely a rehearsal of the history of the shooting, a past transaction, and is not admissible as part of the res gestae. In *Lewis vs. State,* 109 Miss. 586, it was held that in a prosecution for murder, where a child of the decedent, a few moments after the fatal shot, said to the defendant, "You killed my poor father for not a thing in the world; he hasn't done a thing in the world"—such statement was inadmissible as part of the res gestae, since it is not enough that a statement should throw light on a transaction, or that it was made so soon after the occurrence as to exclude the presumption that it was fabricated, or that it was made under circumstances as to compel the conviction of its truth, the determining question being whether the declaration is a verbal act, illustrating, explaining, or interpreting other parts of the transaction of which it is itself a part, in which case it is admissible, or is merely a part of a history, or a completed past affair, in which case it is not admissible. In *Boles vs. State,* 24 Miss. 445, it was held that where a witness who had pursued the prisoner soon after the killing, was asked by the district attorney the question, "When you had overtaken the prisoner, or while pursuing him, what did you say to him?" and the witness replied, without objection, that he had asked the prisoner why he committed the act, it was held that the exclusion of the prisoner's reply to the effect that "he would not have any man following him around town," was correct. In *Little vs. State,* 87 Miss. 512, it was held that an exculpatory statement made by the defendant five minutes after he struck the fatal blow, not being part of the res gestae, is not admissible in evidence on a trial for the homicide. In *Mayes vs. State,* 64 Miss. 329, it was held that a statement made in the absence of the accused, and five minutes after he was fatally cut, as to who cut him and how, is on the trial of accused not admissible as part of the res gestae. In *King vs. State,* 65 Miss. 576, it was held that a declaration by a slayer, after his arrest, as to the cause of the killing, though made but a little more than a minute after the deed was done, is not a part of the res gestae, but a mere statement as to a past transaction, and is therefore not admissible in his favor on trial

for the homicide. In *Brown vs. State,* 72 Miss. 997, it was held that statements made by the defendant's alleged victim, a half hour after he was fatally wounded, in which the defendant was accused of doing the shooting, constitutes no part of the res gestae of the homicide. However, in *Sou. Ry. Co. vs. McLellend,* 80 Miss. 700, in a suit for damages for injuries by an employee, declarations made *immediately after* the injury, to the effect that the injury was purely accidental and that no one was to blame, were held competent. The court does not give upon what grounds this evidence was admitted, whether it was an admission against interest or a part of the res gestae. If the latter, it must have been admitted because it was made *immediately* after the accident, so as to be a part of it.

The case of *I. C. Ry. Co. vs. Tronstine,* 64 Miss. 834, is apt to leave the erroneous impression that the Mississippi court is liberal in requiring the declaration to be made at the time of the act in controversy. In that case the plaintiff left his trunk to be shipped on Friday, which was destroyed by a fire Sunday night. The plaintiff on the following Monday went to defendant's baggage room, where the goods were burned, and asked the baggageman how the trunk was burned, who related the circumstances of the burning. It was held that the declarations of the baggageman were admissible on the ground that the answering of the inquiries was within his authority and was binding on the defendant. In view of the holding of the court on other occasions, holding that a statement one minute after the happening was not a part of the res gestae, the court could not have admitted these declarations made fourteen hours after the fire on that ground, but solely on the ground of agency. As a close scrutiny of these two cases shows, they are not at variance with the host of other Mississippi cases. I think that the Supreme Court of Mississippi has held strictly to the rule that a declaration must not be made after the act which it illustrates or is a part of, but must be made contemporaneously with the act.

In general, if a declaration complies with all the requisites so as to become a part of the res gestae, it may be for any purpose put in evidence. Declarations have been admitted to show a person's bodily feeling, state of mind, whether sound or unsound, to show motive and intent. They have been admitted by those in possession of prop-

erty to explain the character of their possession. In fact, when any act in controversy is admissible, as they usually are, any declaration forming a part of that act, fulfilling the requirements of being a part of the res gestae, is admissible also.

In *Boyd vs. State,* 84 Miss. 414, it was held that on a prosecution for murder by poisoning, the declarations of the deceased describing the symptoms of her then present sufferings are admissible in evidence. Declarations may be used to show a person's state of health, or mind, when the requisites of res gestae have been complied with.[11] In *Sheehan vs. Kearney,* 82 Miss. 688, it was held that declarations by a testator as to the disposition he intends to make of his property before, at the time of, or after the making of the will are admissible of the testamentary capacity, to show his state of mind, whether sound or unsound. Such declarations would seem to be declarations symptomatic of the condition of the mind, whether sound or not, as exclamations forced by pain or disease from bodily sufferings are symptomatic of such pain. Irrational exclamations may thus be symptomatic in one case of a diseased mind, and exclamations of physical pain and anguish in the other case of a diseased body, and competent in both cases for the same reason. In *Miss. Cent. Ry. Co. vs. Turnage,* 95 Miss. 854, it was held that in an action for personal injuries, non-expert witnesses might testify to declarations and expressions of present pain and suffering by the person injured, but statements as to pain one has experienced in the past are not admissible. In *Mobile, etc., Ry. Co. vs. Carpenter,* 104 Miss. 720, it was held that declarations of present pain even after bringing the suit were admissible.

The declarations accompanying an act have been admitted to show motive or intent of the person. In *Bell vs. Morrison,* 27 Miss. 68, in order to show that the plaintiff did not go to the place of the trespass with the intent of having a difficulty with the defendant, a declaration made shortly before going there, to the effect that he was going to this place for the purpose of getting a load for his flatboat, was admissible. In *Fulton vs. Fulton,* 36 Miss. 517, it was held that in a suit for divorce the declarations made by the complainant to the defendant about the time of the separation, explaining their relations, and the motives on which the complainant acted, are admissible as part of

11 Miss. Central Ry. Co. vs. Turnage, supra; Sheehan vs. Kearney, supra.

the res gestae. In *Herrington vs. Bradford* it was held that where an instrument on its fact was uncertain as to whether it was a deed or a will, the acts and declarations of the maker at the time of its execution were admissible to show the intent of the maker as part of the res gestae.

Declarations of persons in possession of personal property may be received as verbal acts characterizing and explaining the nature of such possession, as a part of the res gestae. These declarations must not go to explain the title or how it was obtained. There is a diversity of opinion as to whether self-serving declarations of a person in possession of personal property are admissible. As this evidence is not admitted on the ground of the credibility of declarant, such self-serving declarations would be admissible on principle. This precise point has not been passed on in Mississippi.

Declarations by one in possession of land, characterizing and explaining such possession and title, are admissible, even if not adverse to declarant. However, such declarations are only competent to show the character of the possession and by what title the possessor holds. They are not competent to sustain or destroy the record title. Also the declarations must not be contrary to the recitals in deeds executed by the declarant. If the declarant was not in possession at the time he made the declarations, they are not admissible. In *Cameron vs. Lewis,* 59 Miss. 134, it was held that declarations of one in possession at the time, explaining the possession, may be admissible as part of the res gestae, but that declarant must be in possession at the time he made the declaration. Declarations by those in possession of land as to the boundary lines are admissible as part of the res gestae if its requisites are complied with.

Whatever an agent does in the lawful exercise of his authority is imputable to the principal, and where the acts of the agent will bind the principal, his representations, declarations, and admissions respecting the subject matter will also bind him, if made at the same time and constituting a part of the res gestae.[12] Before declarations of the agent should be admitted against the principal, the fact of the agency and authority must be first proved. This cannot be done by the declarations themselves, as

12 Jones on Evidence; Hall vs. Clopton, supra; Mobile Ry. Co. vs. Stinson, supra; Ward vs. Y. & M. V. Ry. Co., 79 Miss., 145.

this would allow the agent to delegate power to himself. Generally speaking, the agent's declarations must be made during the transaction. In *Miss. Ry. Co. vs. Moore,* 59 Miss. 243, it was held that declarations of a conductor made some days after the plaintiff's fall that he kicked him from the train, was not admissible as part of the res gestae. In a similar case it was held that in an action against the railroad company for personal injuries, testimony that the engineer in charge of the locomotive, seven minutes after the injury said, "How is a drunken man to see a drunken man?" was not admissible against the company. If the declaration was made by the agent during his agency and in the discharge of his duty, it is admissible. Thus, in *Ward vs. Y. & M. V. R. R. Co., supra,* it was held that testimony to the effect that agent of the railroad company swore at the plaintiff and threatened to shoot her if she re-entered the waiting room, was admissible in evidence in an action by the plaintiff, who was a passenger, against the railroad company for the misconduct of the agent. In *Ry. Co. vs. Jones,* 73 Miss. 229, and *Mobile, etc., Ry. Co. vs. Stinson, supra,* it was held that declarations of defendant's fireman as to how the fire causing the damage originated was admissible against the defendant, when made during the fire. Thus, if an agent is acting within the course of his employment, and the declaration complies with the requisites of res gestae, such declaration is admissible against the agent's principal.

TABLE OF CASES CITED AND REVIEWED

Simmons vs. State, 61 Miss., 243; *Boles vs. State,* 24 Miss., 445; *Head vs. State,* 44 Miss., 731; *King vs. State,* 74 Miss., 576; *Sullivan vs. State,* 32 Sou. 2; *Little vs. State,* 87 Miss., 512; *Newcomb vs. State,* 37 Miss., 383; *Lloyd vs. State,* 70 Miss., 251; *Gibson vs. State,* 16 Sou. 298; *Brown vs. State,* 78 Miss., 737; *Boyd vs. State,* 84 Miss., 414; *Moore vs. State,* 86 Miss., 160; *Archer vs. Helm,* 70 Miss., 174; *Meek vs. Perry,* 36 Miss., 190; *Brown vs. State,* 78 Miss., 637; *Sheehan vs. Kearney,* 82 Miss., 688; *Miss. Cet. Ry Co. vs. Turnage,* 95 Miss., 864; *Bond vs. State,* 128 Miss., 792; *Mobile Ry. Co. vs. Carpenter,* 104 Miss., 720; *I. C. R. R. Co. vs. Tronstine,* 64 Miss., 834; *Hall vs. Clopton,* 56 Miss., 555; *Herrington vs. Bradford; Holman vs. Murdock,* 34 Miss., 275; *Fulton vs. Fulton,* 36 Miss., 517; *Church vs. Vicksburg,* 50 Miss., 601; *Cameran vs. Lewis,* 59 Miss., 134; *Montgomery vs. McGuire,* 59 Miss., 193; *Y. & M. V. Ry. Co. vs. Jones,* 73 Miss., 229; *Mobile Ry. Co. vs. Stinson,* 74 Miss., 453; *Ward vs. Y. & M. V. Ry. Co.,* 79 Miss., 145; *Bell vs. Morrison,* 27 Miss., 68; *Woodal vs. Stewart,* 65 Miss., 147; *Moore vs. Ry. Co.,* 59 Miss., 243; *Ry. Co. vs. McGowan,* 62 Miss., 682; *Sou. Ry. Co. vs. McLellan,* 80 Miss., 700; *Mayes vs. State,* 64 Miss., 329; *Scaggs vs. State,* 8 S. & M., 722; *Ala.*

Great So. Ry. Co. vs. Shannon, 109 Miss., 230; *Newcomb vs. State,* 32 Miss., 383; *Merrill vs. State,* 58 Miss., 65; *Moore vs. Chicago. Ry. Co.,* 59 Miss., 243; *Head vs. State,* 59 Miss., 310; *Tucker vs. Whitehead,* 59 Miss., 594; *Kraner vs. State,* 61 Miss., 158; *Boyd vs. State,* 84 Miss., 414; *Field vs. State,* 57 Miss., 474; *McCray vs. State,* 91 Miss., 263; *Johnston vs. State,* 101 Miss., 397; *Slaydon vs. State,* 102 Miss., 101; *Collier vs. State,* 106 Miss., 613; *Mackie vs. State,* 138 Miss., 740; *Wells vs. Shipp,* 1 Miss., 485; *Douglas vs. State,* 77 Sou. 817; *Ala. Great Sou. Ry. Co. vs. Daniel,* 108 Miss., 358; *Vicksburg, etc. Ry. Co. vs. O'Brien,* 119 U. S., 99; *Wewcastoe vs. State,* 37 Miss., 383; *Sims vs. Forbes,* 86 Miss., 412; *Ry. Co. vs. McGowan,* 62 Miss., 682; *State vs. Spangler,* 23 Sou. 33; *Spivey vs. State,* 58 Miss., 436; *Miller vs. State,* 68 Miss., 221; *Kendrick vs. State,* 55 Miss., 436; *Dean vs. State,* 85 Miss., 40; *Wildey vs. Bonney,* 31 Miss., 664.

Arrangements have been made with the leading publishers, whereby we will be furnished, for purpose of review, the outstanding law books as they are published. These reviews will appear in subsequent issues, under the topic, "Book Reviews."

RECENT MISSISSIPPI CASES

Action, Ney Number 57 (1); 59.
Justices of the Peace, Key Number 174 (12).
Appeal and Error, Key Number 61.

C. & G. RY. CO. V. MISSISSIPPI CLINIC
120 So. 187.

FACTS: Two actions by the Mississippi Clinic against the Railway Company, commenced in a Justice court. The defendant appealed from the judgments therein to the Circuit Court where the cases were consolidated, and from which judgment the defendant appeals.

HELD: Courts of law have inherent power to consolidate cases when they are between the same parties, depend on the same or substantially the same facts, and when thereby the interests of economy and expedition would be subserved, and especially when actions in the first instance have been brought in one suit. On appeal from the Justice court, the Circuit Court may consolidate pending the same parties depending on substantially the same facts, although the amount in controversy as a result of the consolidation exceeds the jurisdiction of the Justice court. At law, a consolidation merges the several actions into one, and it then constitutes but a single issue.

Appeal and Error, Key Number 1009.

BYRD V. HENDON, ET AL.
120 So. 203.

FACTS: This was a bill filed in chancery to have a deed declared to be a mortgage. There was conflict in the evidence in the lower court as to whether or not it was understood to be a mortgage. The Chancellor found that the complainant had not made out his case and that certain receipts shown in the case were forgeries.

HELD: The finding of the Chancellor will not on appeal be reversed where there is a direct conflict of evidence and where the finding was one of fact. In this case, there was ample evidence to sustain the Chancellor's finding.

Appeal and Error, Key Number 1082 (2).

MERRELL ENGINEERING CO. V. BOLTON & CARR
119 So. 355.

FACTS: Suit by Bolton and Carr against Engineering Co., et al. Judgment for plaintiffs. Appeal. The suit was for the recovery of the purchase of certain materials and supplies furnished to Dees, an appellant, while he was engaged in grading certain streets in city of Newton, which the Engineering Co. had contracted to pave. No assignment of error was filed to the judgment of the County Court.

HELD: Errors committed in the County Court, not complained of in the Circuit Court, on appeal thereto, are waived. In the absence of any as-

signment of error in the Circuit Court, the judgment of that Court affirming the judgment of the County Court must be affirmed.

Automobiles, Key Number 245 (61, 90).
Negligence, Key Number 97.
Trial, Key Number 295 (1); 296 (11).
Appeal and Error, Key Number 1064 (1).

FRIEDMAN V. ALLEN
118 So. 828

FACTS: Appellant sued the appellee for damages done appellant's automobile, as the result of a collison between their automobiles, through the alleged negligence of the appellee. Both were exceeding the speed limit when the collision occurred, which was about midnight. The evidence on behalf of the appellant tended to show that the negligence of the appellee was the proximate cause of the injury, while the evidence of the appellee tended to show that the negligence of the appellant was the proximate cause of the collision. Appellant asked for a directed verdict. An instruction given for the appellee was that the jury should diminish the damages in proportion to the appellant's negligence without regard as to whether or not such negligence contributed to the collision.

HELD: The question as to whether the negligence of the plaintiff or the defendant caused the injury was for the jury to decide and therefore the Court rightfully refused to give a directed verdict. Only contributory negligence on the part of the plaintiff can be considered for the purpose of diminishing damages in proportion thereto. All the instructions given in a case are to be taken together and considered by the jury as one instruction. An erroneous instruction will not be reversible error unless it is so squarely in conflict with the other instructions putting the principles of law to the jury that it is calculated to be misleading. The instructions granted in the court below and which is above set forth is not reversible error since the other instructions in the case plainly authorized the jury to reduce damages only in proportion to the contributory negligence of the plaintiff.

Bastards, Key Number 62.

SMITH V. HICKMAN
118 So. 894.

FACTS: Bastardy proceedings by Della Hickman, by next friend, against Smith. Judgment for plaintiff and defendant appeals. Affirmed. The child in question was born in October, 1927. Upon the trial the Court admitted testimony over the appellant's objection, that prosecutrix had formerly given birth to a child in 1925 and that the appellant was also the father of that child and that the appellant had effected a compromise settlement in that matter.

HELD: It is a well established rule that former acts of sexual intercourse in such cases are admitted for the purpose of showing familiarity between the parties, making the act alleged by the prosecution more probable.

Breach of the Peace, Key number 5.

MOREE V. STATE
119 So. 202.

FACTS: Appellant, Moree, was convicted on an indictment of unlawfully disturbing the peace of a family. The indictment, among other things, charged the defendant with unlawfully disturbing the peace of the family, with entering the dwelling house and in the presence of certain members of this family, using profane language, etc. On the trial, it appeared that the defendant fired a bullet near the rear of the home at about three in the morning and that shortly thereafter he came onto the front porch and to the front door and began cursing.

HELD: The indictment was sufficient by the proof that the defendant came onto the front porch of a dwelling and used profane language, because the front porch of a dwelling is a part thereof, and the charge of entering the dwelling is supported by the proof of coming onto the front porch thereof.

Criminal Law, Key Number 1036 (8); 336.

CROSBY V. STATE
118 So. 604.

FACTS: The appellant was convicted of the crime of the unlawful possession of whiskey and was sentenced to pay a fine of $500 and serve 30 days in jail, from which he prosecutes this appeal. The record in the case discloses that in the lower court the state made no effort to prove venue and this question is raised the first time by timely presentation to this Court.

HELD: Objection that the state made no effort to prove venue in a criminal case may be raised by the defendant for the first time in the Supreme Court. Failure on the part of the state to prove venue was fatal to the conviction for possessing liquor, since the burden is on the state to prove venue in all criminal cases.

Criminal Law, Key Number 1144 (17); 995 (7).

MASK V. TOWN OF PONTOTOC
119 So. 156.

FACTS: Appellant, Mask, was convicted in the lower court on a charge of unlawfully having in his possession intoxicating liquor, in violation of an ordinance of the town of Pontotoc. Appellant contends that his conviction was erroneous since no ordinance prescribing a penalty for the offense charged in the affidavit was introduced in evidence. But there was an agreement entered on the record to the effect that there was such an ordinance in existence and that same can be considered as introduced in evidence without the production of the same.

HELD: The presumption in favor of the correctness of the judgment fixing the penalty as authorized by Hemingway's Code, sections 6956 and 6784 will prevail. By the agreement, the Court was fully authorized to examine the statute and had the right to do so.

Discovery, Key Number 95.

Courts, Key Number 37 (3).

SECURITY FINANCE COMPANY V. TINDALL
118 So. 606.

FACTS: The appellant, an Iowa corporation, sued appellee on several promissory notes executed by him to the Brenard Mfg. Co., and now owned by the appellant. The appellee filed a motion under section 1003, Code of 1906 (section 759, Hemingway's Code, 1927), for an inspection and the taking of copies by the appellee of certain books and papers in the possession of the appellant, alleged to contain evidence relating to the merits of the suit. Motion was sustained and order made accordingly. Appellant declined to comply with such order and, on motion of the appellee, its suit was dismissed, from which order it prosecutes this appeal, contending that the statute does not apply to nonresidents.

HELD: The statute applies to all litigants, irrespective of residence, and simply permits one litigant to obtain from another, by order of the court in which the litigation is pending, information, which except for the statute, he might be compelled to resort to a bill of discovery in order to obtain. The appellant, having submitted itself to the jurisdiction of the Court by instituting suit, must abide by the Court's order.

Discovery, Key Number 8.

STRIPLIN, ET AL. V. M. & O. R. CO.
120 So. 193.

FACTS: Bill of discovery by the Railway Company against the owners of cotton that had been partially destroyed by fire in warehouse after payment by insurance companies thereafter. The owners had sued the Railway Company on the ground that its negligence contributed to the burning of the warehouse. The Company seeks discovery for the purpose of ascertaining the amount and value of the cotton which had been salvaged.

HELD: The right of a plaintiff in equity to the benefit of the defendant's oath under a bill of discovery is limited to a discovery of such material facts as relate to the plaintiff's case and does not extend to discovery of matter in which the defendant's case is to be established or evidence relating exclusively thereto. Such evidence, as here sought, was not required to establish as affirmative defense, but was on which reliance must be placed in order to establish the amount of damages.

Equity, Key Number 247.
Appeal and Error, Key Number 875.

McCOLLUM V. DILLARD
119 So. 180.

FACTS: A demurrer to the bill of complaint was sustained and the decree sustaining the demurrer recited among other things that the complainant was granted thirty days in which to amend and the defendants were given sixty days from that date in which to plead, answer or demur to amended bill, and that in the event an amendment was filed within the said thirty days, then the bill should stand as dismissed with prejudice. No amendment was

filed within thirty days, but, after the expiration of the thirty days, an amended bill was filed. At the next succeeding term, a motion was made to strike the said amended bill from the files because not filed within the thirty days allowed by the decree, which motion was sustained. Another amended bill was filed during the said term, which on motion was also stricken from the files and the two cases were consolidated for appeal.

HELD: The decree became final when the amended bill was not filed within the thirty days allowed and the Chancery Court is without power at the next term to permit an amendment to be filed. An appeal allowed from refusal to allow the last amended bill to be filed does not appeal from the first decree rendered and where more than six months have expired after the first decree became final an appeal is barred and the Supreme Court cannot on the second hearing review the ruling of the first decree.

Husband and Wife, Key Number 19 (3); 299 (1).

MAXEY V. MAXEY
120 So. 179.

FACTS: Suit for divorce by Kirby Maxey against his wife. From an order disallowing the wife's request for alimony pendente lite the wife appeals. In 1926 the appellant, who was then living apart from the appellee, instituted a proceeding for separate maintenance and support of two children. The appellee there claimed that the appellant left him of her own accord without fault on his part. The Court, on full hearing, refused to allow her separate maintenance but did allow a support fund for the children. No change in the situation of the parties has occurred since that time.

HELD: The allowance of alimony pendente lite is simply a method of providing for the separate maintenance of the wife by the husband pending the determination of a divorce proceeding, she living apart from him. While the marriage relation continues, the wife is entitled to support from the husband when she continues to live with him, provided he is willing for her to do so, and so acts that she can do so. The decree which was rendered against the wife who was living apart from her husband in a previous suit for separate maintenance is res adjudicata of her right to alimony pendente lite in the husband's suit for divorce when no change in the situation of the parties has occurred.

Indictment and Information, Key Number 1032 (5).

STEWART ET AL. V. STATE
118 So. 626.

FACTS: The affidavit charging unlawful possession of liquor was based on information and belief but failed to charge, as it should have done, the fact based upon information and belief that the appellants had in their possession intoxicating liquor. The insufficiency of the affidavit was first raised on appeal.

HELD: Such defect cannot be first raised on appeal. The affidavit was not void since the defect was one which could have been amended.

Landlord and Tenant, Key Number 125 (2); 150 (1); 166 (4).

GREEN V. LONG
118 So. 705.

FACTS: Action by Long, guardian of Barnett, against Green. Judgment for plaintiff and defendant appeals. Appellee was suing for three months' rent on a certain store building which the appellant was occupying under a one-year lease. Appellant did not deny the correctness of the account sued but did deny liability and, in a special plea of recoupment, contended that his stock of goods had been damaged by a leaky roof on the building in question in a sum exceeding the plaintiff's demand. The lease contained no express covenants requiring the owner to repair the roof during the term of tenancy. The appellee however voluntarily undertook to repair the leaky roof during the term but the work was defective.

HELD: Generally in the absence of express covenants in the lease, and in the absence of deceit and misrepresentations, there is no implied covenant that the lessor will make repairs, or that the premises are suitable for lessee's business. Yet, if the lessor voluntarily undertook to repair during the term of the lease, he is liable for want of due care in the execution of the work, based on the principle of liability for negligence, and not because of implied covenant to repair or implied consideration.

Marriage, Key Number 2; 54.

ELLIS V. ELLIS
119 So. 304.

FACTS: Bill for the purpose of annulling the marriage of the complainant's brother, now deceased, which was begun after his death, alleging that no marriage ceremony was ever in fact performed between the deceased and the one claiming to be his wife because another person was substituted in lieu of the deceased, alleging that his brother was insane at the time that the marriage was supposed to have taken place.

HELD: Marriage is solely under the control of the public regulations and the state has the right to say what marriage shall be void and those that shall be voidable. A voidable marriage is good for all purposes until avoided or annulled and cannot be attacked collaterally but only in a direct proceeding during the life time of the parties. The marriage here was not void under Hemingway's Code, 1927, sections 2725-2727, and was merely voidable, therefore the above rules govern.

Marriage, Key Number 58 (8).

ROGERS V. ROGERS
118 So. 619.

FACTS: Appellee seeks to have marriage with the appellant annulled on the ground that he consented thereto because of duress. The proof in the record shows a total absence of any direct threats of bodily harm previous to or at the time of the marriage and the only fact in evidence which seeks to establish coercion or duress is the fact that the appellee was erroneously

informed by the parties present that the penalty for the offense of statutory rape, which he had committed upon the appellant, was death.

HELD: The action of the appellee was voluntary in the legal sense and he cannot have the marriage annulled on the ground that he was coerced into it, since the offense, statutory rape, with which he was charged, was one which he was guilty of and the punishment, which he married to escape, was suspended.

Perpetuities, Key Number 6 (3).

NORFLEET V. NORFLEET, ET AL.
119 So. 306.

FACTS: Appellees filed bill for the construction of the will of J. C. Norfleet, deceased, and for a partition of a certain plantation. There was a provision if the will limiting devise to the three sisters and two brothers of the deceased in case either should die without leaving heirs.

HELD: Such a devise was invalid under the Two Donee Statute (Hemingway's Code, 1927, section 2424), in that, although the land was devised to succession of donees then living, the number of donees exceeded the limit of two as fixed by the statute.

Searches and Seizures, Key Number 2.
Indictment and Information, Key Number 49.
Criminal Law, Key Number 393 (2).

COFER V. STATE
118 So. 613.

FACTS: Sheriff searched defendant's home under a search warrant authorizing him to search defendant's home for intoxicating liquors "stored, kept, owned, controlled, or possessed for purposes of sale," etc., issued under authority of Laws 1924, chapter 244, found shotgun shells in a trunk and seized them. The shells were introduced into evidence in prosecution for murder.

HELD: Since the shells were not designated in the warrant as the thing to be seized, the seizure of them was unlawful since shells are not contraband and possession of same is not unlawful per se, said seizure being in violation of Constitution 1890, section 23. The introduction of the shells in evidence was in violation of Constitution of 1890, section 26, since it was tantamount to compelling defendant to give evidence against himself.
Sunday, Key Number 12.

Sales, Key Number 176 (3).

SCHULZE BAKING CO. V. GOODSON, ET AL.
119 So. 353.

FACTS: Suit on a contract for the purchase of an advertising scheme. The written order for advertising material expressly provided that it was subject to the seller's acceptance and was secured by an agent on a Sunday.

The purchaser's attempt to secure release from the contract for purchase solely on the ground that they had in the meantime sold the business in which the scheme and the material were to have been used. The contract was accepted on a secular day.

HELD: Even assuming that the soliciting order was in violation of Hemingway's Code, 1927, section 1157, the contract was good because the offer was simply an offer which could have been accepted or rejected since preliminary negotiations on Sunday do not invalidate a contract thereafter made on a secular day. After the purchasers have set up the sole ground of their defense as being that they have sold the business in which the material was to have been used, they cannot thereafter defend the action on the ground that there was a defect in the material or that there was delay in the delivery thereof.

Witnesses, Key Number 216.

HILL, ET AL. V. STATE
118 So. 539.

FACTS: Appellants, Hill, et al., were convicted of unlawful possession of intoxicating liquors from which judgment they prosecute this appeal. The officer found one of the appellants in the car with the whiskey in his bosom, and, upon the question of probable cause for such search without a search warrant, the officer was asked by the counsel for appellants from whom he had obtained the information that the appellants had whiskey, to which question, the officer replied that he would not like to divulge his name since he had promised not to tell his name. Counsel insisted that witness answer said question, but the Court replied that "I won't require him to do that; he is an officer of the law and said that he had information about it." Exception.

HELD: Probable cause to believe that intoxicating liquors are being transported will authorize search thereof without a search warrant. Section 2, chapter 244, Laws 1924 (Hemingway's 1927 Code, 2239). The officer must have probable cause for its detention and search. Since here, the officer stated that he acted upon information given him, he must disclose the name of his informant, even though he has promised that he would not divulge it, in order that the defendant might have the opportunity of showing that the informant was not a person worthy of belief.

Witnesses, Key Number 405 (1).
Assault and Battery, Key Number 66.

BARNES V. STATE
119 So. 172.

FACTS: Appellant was convicted of the crime of assault and battery. He had testified that one Brill had been flirting with his, the appellant's, wife. Appellant called Brill into his office and informed the latter of what he had heard and thereupon proceeded to assault and beat Brill with a pistol, inflicting upon him serious wounds. Brill testified that he was not flirting with the appellant's wife. Appellant did not object to the testimony but at-

tempted to contradict the testimony of Brill, which the Court ruled out. Appellant excepted.

HELD: The test as to whether the matter is collateral within the meaning of the rule forbidding the impeachment of a witness on an immaterial issue is whether the cross-examining party would be allowed to prove it as a part, or in support, of his case. If not it is irrelevant; for what is improper to be proven directly cannot be rightfully proven indirectly. Under the law, it was wholly immaterial as to whether or not Brill was flirting with the appellant's wife.

DEFINITIONS

"Recording" means the copying of the instrument to be recorded into public records in a book kept for that purpose by or under the superintendence of an officer therefor.

White v. Stennis, 118 So. 902.

C. S. S.

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Frierson, J. F., Columbus
Galloway, J. F., Gulfport
Gardner Hanun, Gulfport
Garnett, Chas. L., Columbus
Geisenburg, W. A., Natchez
Gex, W. J., Bay St. Louis
Gilbert, C. O., Winchester
Gilbert, Victor, Meridian
Gillis, J. K., Philadelphia
Gipson, J. V., Meridian
Glass, F. M., Winona
Graham, D. M., Gulfport
Greaves, H. B., Canton
Green, J. W., Jackson
Green, E. H., Cleveland
Green, John D., Jr., Starkville
Green, Marcellus, Jackson
Guice, W. L., Biloxi
Guyton, J. D., Kosciusko
Gwin, S. L., Greenwood
Hair, W. T., Biloxi
Hall, Wm. M., Memphis, Tenn.
Haley, L. P., Okolona
Hallam, L. C., Cleveland
Hamon, Thos. L., Jr., Houston
Hannah, T. C., Hattiesburg
Haralson, Wm., Hattiesburg
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Heidelburg, R. W., Hattiesburg
Heiss, John L., Gulfport
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Hendrix, T. D., Jackson
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Johnson, Thos. H., Corinth
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Jones, R. L., Brookhaven

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